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57333

CHARLES F. KING,)	ABST
Plaintiff-Appellant,)	
v.)	APPEAL FROM THE
WERNER EICHHOEFER,)	CIRCUIT COURT OF
Defendant-Appellee,	)	COOK COUNTY.
and)	
PAUL GORKA,	)	Hon. Robert Jerrick,
Defendant.	)	Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, Charles F. King, filed suit to recover \$5,000 allegedly due and owing him by defendants, Werner Eichhoefer and Paul Gorka. After a bench trial, the trial judge entered judgment in favor of the plaintiff against the defendant Gorka in the sum of \$5,000. At the same time, the court entered judgment in favor of the defendant Eichhoefer and against plaintiff. Plaintiff appeals from that portion of the judgment rendered in favor of Eichhoefer, contending that the judgment entered in favor of Eichhoefer was against the manifest weight of the evidence. The judgment entered against Gorka is not involved in this appeal.

Gorka entered into a written contract with Eichhoefer to purchase a cleaning business located in River Forest, Illinois, at a purchase price of \$7,000. Gorka made a down payment of \$1,000. Gorka then obtained a loan of \$5,000 from plaintiff, and used the money as an additional payment to Eichhoefer for the cleaning business. Six weeks after Gorka took possession and commenced operation of the cleaning business, Eichhoefer ousted Gorka from the premises and re-took possession of the cleaning business. At trial Gorka and his employee, Marie Sullivan, testified that at the time of the ouster Eichhoefer promised that he would repay the \$5,000 to plaintiff. Upon Eichhoefer's refusal to pay, plaintiff brought this action seeking recovery as a third-party beneficiary.

THE HECKMAN BINDERY, INC.

2/28/74

Appellee Eichhoefer has failed to file an appearance or answering brief in this court. Ordinarily in such instances, this court, despite appellee's failure to file a brief, will examine the record to determine the merits of the appeal. Daley v. Richardson, 103 Ill.App.2d 383, 243 N.E.2d 685. However, in certain cases, this court has reversed pro forma without setting forth any additional reasons because of appellee's failure to submit a brief. Matyskiel v. Bernat, 85 Ill.App.2d 175, 228 N.E.2d 746; Gibralter Corporation v. Flobudd Antiques, Inc., 131 Ill.App.2d 545, 269 N.E.2d 515. In our view, the instant case is appropriate for the latter action. The trial court, although holding in favor of Eichhoefer, specifically recognized that Eichhoefer had not only regained his business, but had also obtained \$6,000 from Gorka. The trial court also characterized as "fictitious" Eichhoefer's statement that he had been compelled to pay certain bills for Gorka. In view of his successful financial dealings with Gorka, it would appear that Eichhoefer is under no financial disability which would prevent him from filing a brief. His failure to do so warrants a pro forma reversal of the judgment rendered in his favor.

Accordingly, that portion of the judgment of the circuit court of Cook County entered in favor of Eichhoefer and against plaintiff is reversed, and this cause is remanded with directions to the circuit court to enter judgment in favor of plaintiff, Charles F. King, and against Werner Eichhoefer in the amount of \$5,000.

Judgment reversed and
cause remanded with directions.

DEMPSEY, P.J., and MCGLOON, J., concur.



56812

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
CLARENCE HARRIS,	)	HONORABLE JOHN J. CROWLEY,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant, Clarence Harris, was found guilty after a bench trial of the crime of theft in violation of section 16-1 (a) (1) of the Criminal Code. (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1).) Defendant was placed on probation for a period of one year, with the condition that he serve the first four months in the House of Correction. On appeal, defendant argues that he was denied due process of law by the admission into evidence of the identification testimony which was tainted by a suggestive pre-trial show-up and that he was not proven guilty beyond a reasonable doubt.

The testimony as adduced at trial follows: Lelia Haze testified that she is the owner of a store located at 2347 Lake Street in Chicago, Illinois. On August 17, 1971, at approximately 4:10 p.m., the defendant entered her store. He produced a gun and announced a robbery. After taking approximately \$60, he fled. The robbery took approximately three minutes. A week and a half later, the defendant was brought to the store by two police officers and was identified by Mrs. Haze as the robber.

Thomas Lacy testified that on August 17, 1971, he was working in the store for Mrs. Haze. At approximately 4:10 p.m., he observed the defendant come in, produce a revolver and rob the store. He was also present a week and a half

later when the police brought the defendant back to the store. He positively identified the defendant as the robber.

The defendant, Clarence Harris, testified that on August 17, 1971, he was at work until 4:00 p.m. Thereafter, he went home and together with his girl friend went to a store at Roosevelt Road and Pulaski Avenue. He denied robbing the store and testified that prior to his arrest he had never been in the store.

Mary Eubanks, the defendant's girl friend, testified that on August 17, 1971, at approximately 4:00 p.m., she was with the defendant at his apartment and thereafter together they went to the store located on Roosevelt Road and Pulaski. After going to the store, they returned to the defendant's home, arriving there at approximately 4:45 p.m.

A police officer (no name appearing of record) testified that on August 24, 1971, he arrested the defendant. The defendant was returned to the store at 2347 W. Lake Street, where he was identified as the robber by Mrs. Haze.

Initially, the defendant argues that the identification procedures by which he was brought back alone to the store to be identified were constitutionally deficient. At trial the defendant did not move to suppress the identification testimony either prior to or during the trial. The record also shows that the defendant did not object to the introduction of the identification testimony at trial and in his motion for a new trial the defendant did not raise the issue of the identification testimony. By his failure to raise the question of the admissibility of the identification testimony at trial, the defendant failed to preserve that issue for review. People v. Fox, 48 Ill.2d 239, 269 N.E.2d 720; People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678.

The defendant argues that the issue of the admissibility of the identification testimony should be considered under the doctrine of plain error. A review of the testimony as set out above shows that there was clearly an independent basis for the in-court identification of the defendant. Based upon all of the evidence, we feel that this is not a case which would justify the use of the plain error doctrine.

The defendant's second argument is that he was not proven guilty beyond a reasonable doubt. The defendant bases this argument upon two grounds: first, that the identification testimony was insufficient; and second, that the trial judge was under a misapprehension as to the distance between the defendant's place of employment and the scene of the robbery. The amount of weight to be given to the identification witness' testimony is a question of credibility which is for the trier of fact to determine. This court will not disturb the determination of the trial court as to credibility unless the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Terrell, 6 Ill.App.3d 941, 287 N.E.2d 74.) Here, the defendant was positively identified as the robber by two credible witnesses, who both had an opportunity to observe the defendant for approximately three minutes in a well lit store. The trial court determined that both witnesses had a sufficient period of time to adequately identify the defendant. We cannot say that that determination was erroneous. People v. Gaiter, 8 Ill.App.3d 784, 291 N.E.2d 172.

The defendant also argues that the trial judge was under a misapprehension as to the distance between defendant's place of employment and the scene of the robbery. The defendant argues that the trial judge was under the impression that the distance

was approximately 20 blocks, when in fact the distance was 33 blocks. The defendant maintains that since he worked until 4:00 p.m., he could not have gotten to the scene of the robbery by 4:10 p.m. The added thirteen blocks does not make a significant change in the status of the case. A review of all the evidence adduced at trial demonstrates that the trial judge had a sufficient basis to find that the defendant was proven guilty beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

First Division, Hallett, J. not participating.



55844

PEOPLE OF THE STATE OF ILLINOIS,	)	ABST
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
ELLIS M. HENDERSON (Impleaded),	)	HONORABLE RICHARD J.
	)	FITZGERALD, Presiding.
Defendant-Appellant.))	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Defendant, Ellis M. Henderson, was found guilty after a jury trial of the crime of armed robbery, in violation of Section 18-2 of the Criminal Code, and was sentenced to a term of ten to twenty years in the penitentiary. Ill. Rev. Stat. 1969, ch. 38, par. 18-2.

On appeal defendant contends that the evidence failed to prove defendant guilty of armed robbery beyond a reasonable doubt; and that it was error for the police officer to testify that when he searched the automobile driven by defendant, he found a brown packet which appeared to him to contain marijuana.

Defendant filed a motion to suppress the identification of defendant by the victims, Mr. and Mrs. Hickey, and also a motion to suppress the physical evidence. At the hearing on the motion to suppress the identification testimony, the victims testified that on the day after the robbery they identified defendant from 8 color photographs which were brought to their home by police officers. They were in the same room at the time they identified the photographs, but Mrs. Hickey testified that she did not hear her husband identify them. Mr. Hickey further testified that at the time of the robbery the garage was well lighted and defendant was about four or five feet away from him. Both victims gave the police a description of defendant the night of the robbery.

The trial court denied defendant's motion to suppress the

identification, stating that both witnesses had ample time to view defendant within close proximity for a period of at least five minutes; that they gave a description of defendant to the police which seemed to fit defendant; and that there was no suggestive action on behalf of the Police Department.

After a hearing, the trial court also denied defendant's motion to suppress the physical evidence.

The record of the trial discloses that on April 3, 1970, defendant and another man entered the garage in which the Hickeys had just parked their car. Defendant, who was armed, told the Hickeys that he wanted their wallets. After Mr. Hickey gave defendant his wallet, defendant went through Mr. Hickey's pockets looking for more money. Defendant then took Mrs. Hickey's purse, dumped the contents on the trunk of the car, and took her wallet, which held her identification cards. The robbery lasted between five and eight minutes. During this time both victims had a clear view of defendant, who was in close proximity to them. The light was on in the center of the garage and the light bulb was about six feet from the floor.

Later that night, Officers Iorio and Albert of the Village of Schiller Park Police Department stopped a car driven by defendant. Defendant could not produce a driver's license and the car was found to be stolen. Defendant was placed under arrest and a search of the car revealed a .38 caliber pistol and the wallets of Mr. and Mrs. Hickey. Officer Albert testified that a brown packet which looked like marijuana was found on the floor of the car. Counsel for defendant made no objection to the introduction of this testimony.

Defendant argues that, since the evidence as to the pretrial identification was not used in the trial, the only question is whether the police procedure in having the two witnesses identify the photograph of defendant was so unduly suggestive as to affect

the credibility of the identification at the trial.

In People v. Rodgers (1971), 3 Ill.App.3d 85, 279 N.E.2d 72, the court sustained a conviction where there was an independent origin for the in-court identification, even though a pretrial photographic identification was suggestive. The judgment of the Appellate Court was affirmed in People v. Rodgers (1972), 53 Ill.2d 207, 290 N.E.2d 251. Other cases to the same effect are People v. Gates (1970), 123 Ill.App.2d 50, 259 N.E.2d 631, People v. Oliver (1972), 5 Ill.App.3d 860, 284 N.E.2d 369, People v. Cooper (1972), 9 Ill.App.3d 291, 292 N.E.2d 79. Also see People v. Jackson ___ Ill.2d ___, ___ N.E.2d ___, Docket No. 44983, opinion filed April 2, 1973.

In the present case, even assuming that the photographic identification was unduly suggestive, it is clear that the in-court identification had an independent origin, arising from the victim's prior observation of defendant at the time of the crime, and that they were not influenced in their identification by the manner in which they were shown the photographs of defendant at the pretrial identification. The origin of the in-court identification of defendant was the robbery itself and not the photographic identification.

Defendant also argues that the identification of the gun was untrustworthy; and, also, that it was error not to ask the victims to identify their wallets. At the trial the victims testified that defendant had a gun when he entered the garage, and that he took their wallets. Mrs. Hickey testified that her wallet had her identification cards. Both police officers testified that at the time they searched the car they found a .38 caliber pistol and the wallets of Mr. and Mrs. Hickey. This testimony clearly established that defendant took the wallets of Mr. and Mrs. Hickey, and that said wallets were in the car which was driven by defendant at the time of his arrest by the police officers. Mrs. Hickey also identified the .38 caliber pistol found in the automobile as the gun defendant used in the robbery.

It is for the jury to accept or reject the testimony that the gun found in the car was the same gun used to rob the Hickeys, and that the wallets found in the car belonged to them. It is the function of the jury to weigh the testimony, to judge the credibility of the witness and to determine the factual matters in debatable sets of circumstances, and the court will not disturb this determination unless the finding of the jury is against the manifest weight of the evidence. People v. Nicholls (1969), 42 Ill.2d 91, 245 N.E.2d 771.

Defendant also argues that it was reversible error for Officer Albert to testify on direct examination that he took from the car a brown packet "which appeared to me as marijuana." The record discloses that counsel for defendant made no objection or comment at the time this statement was made. It was not elicited by the State. The State asked Officer Albert what was found in the car defendant was driving. The State was seeking corroboration of the testimony of Officer Iorio to the effect that he found the wallets and a gun in the car defendant was driving. In fact, Officer Albert did testify that Iorio found two wallets and a .38 caliber revolver in the car.

Looking at Albert's testimony in the context of the entire trial it can be readily determined that his statement regarding the marijuana had no prejudicial effect upon the jury. Defendant was positively identified by the two victims of the armed robbery. He was arrested for driving a stolen car about an hour after the robbery. In the car the officers found the wallets and credit cards of Mr. and Mrs. Hickey, the victims of the robbery. Also found was a .38 caliber revolver, which Mrs. Hickey identified as the gun defendant used while robbing Mr. and Mrs. Hickey.

Defendant cites many cases in support of the general proposition that it is prejudicial to introduce evidence of crimes other than the one being tried in a criminal prosecution. However, in the instant case no objection was made by counsel for defendant at the time of Albert's testimony. Furthermore, the issue was not raised in the

motion for a new trial or at the time the motion for a new trial was argued orally in the trial court. Under such circumstances the point is considered waived. People v. Trenter (1972), 7 Ill.App.3d 460, 464, 288 N.E.2d 119.

The record fails to disclose any reversible error and, therefore, the judgment of the trial court is affirmed.

AFFIRMED.

No. 56983

DARRELL JOHNSON, a minor by	)	APPEAL FROM THE
ALBERT JOHNSON, his father	)	CIRCUIT COURT
and next friend,	)	OF COOK COUNTY.
)	
Plaintiff-Appellee,)	
)	
v.)	
	)	HONORABLE
FELIX BIVER,	)	DAVID CANEL,
	)	PRESIDING.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

The plaintiff filed a personal injury action for damages arising out of an open intersection collision between two automobiles. At the close of all the evidence, the trial court allowed the plaintiff's motion for a directed verdict on liability, and only submitted to the jury the question of damages. The jury returned a verdict against the defendant in the amount of \$18,866.80, upon which the trial court entered judgment for said amount. The defendant filed a post-trial motion for a new trial or, in the alternative, for a judgment n.o.v., which was denied by the trial court.

On appeal, the defendant contends (1) that the conflicting evidence, with respect to an open intersection collision, made it improper for the trial court to direct a verdict for plaintiff on the issue of liability; (2) that the trial court improperly excluded testimony as to the speed of plaintiff's vehicle; (3) that the court improperly prevented the impeachment of the plaintiff; (4) that plaintiff's counsel improperly injected the matter of insurance coverage into the case; and (5) that the trial court improperly prevented the defendant from bringing out the balance of a conversation that had been partially revealed during examination by the plaintiff.

We will first consider the question of whether it was error for the trial court to direct a verdict for the plaintiff on the question of liability and to submit to the jury the sole question of the amount of damages.

The defendant argues that there was conflicting testimony on the speed and relative position of the two automobiles which had collided and, therefore, it was error for the trial court to direct a verdict for the plaintiff on the issue of liability. The plaintiff contends that the evidence so overwhelmingly favored the plaintiff that a verdict for the defendant could not stand and, therefore, the trial court properly directed a verdict for the plaintiff on the issue of liability. The law is clear that judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. Pedrick v. Peoria & Eastern R. R. Co. (1967), 37 Ill.2d 494, 229 N.E.2d 504; Lewis v. Stran-Steel Corp. (1972), 6 Ill.App.3d 142, 285 N.E.2d 631.

Applying the foregoing principle of law to the case at bar, it appears that there are contested issues of fact and, therefore, it was error for the trial court to direct a verdict for the plaintiff on the issue of liability. The accident occurred at about 12:30 A.M. on December 11, 1965, at the intersection of Wisconsin and 14th Street, in Berwyn, Illinois. Wisconsin is a one-way street northbound, while 14th Street is a two-way street, east and west bound. It is an open intersection with no traffic controls. The weather was very bad; it was misty, rainy and foggy. The intersection was fairly well lighted, but the visibility was bad because of the weather.

The plaintiff testified that he was traveling westbound on 14th Street; that the weather was foggy and drizzling and the visibility was pretty bad; that his headlights were on and he could see the roadway ahead; and that he was going not more than twenty miles per hour. John Gorman, a passenger in the plaintiff's automobile, also testified that the plaintiff was not going over twenty miles per hour and was slowing down as he entered the intersection with Wisconsin Avenue. On the other hand, the defendant testified that the plaintiff was traveling at a high

rate of speed, that the plaintiff's automobile was traveling at least fifty to sixty miles per hour. The defendant testified that his highest rate of speed was twenty miles per hour while he was driving north on Wisconsin Avenue; and that as he approached the intersection of Wisconsin Avenue and 14th Street, he applied his brakes when he was about fifteen feet away from the intersection.

John Gorman, the passenger in plaintiff's automobile, could not tell how fast the defendant's car was traveling. However, when the defendant's automobile was about forty feet away, Gorman yelled to the plaintiff, "He's coming fast. We're not going to make it."

The defendant testified that at the time of the impact, his car was coming to a stop; that the impact took place about the center of the intersection; that the plaintiff's automobile was going west and was approximately halfway across the street when the front of the defendant's car went into the side of the plaintiff's car. After the impact, defendant's car had stopped and did not move. It stayed right in the middle of the intersection. The plaintiff lost control of his car. It hit the curb on the west side of 14th Street and then careened off and went across the lanes of traffic and hit another car that was proceeding eastbound.

In light of the foregoing, it is apparent that the evidence, when viewed in its aspect most favorable to the defendant, does not so overwhelmingly favor the plaintiff that no other verdict could ever stand. Therefore, the trial court erred in directing a verdict for the plaintiff on the issue of liability. Wolfe v. Whipple (1969), 112 Ill.App.2d 255, 251 N.E.2d 77.

In the recent case of Liberio v. Patton (1973), 9 Ill. App. 3d 955, 293 N.E.2d 415, the court reversed the judgment of the trial court, where at the close of the evidence the trial court directed a verdict for the plaintiff on the issue of liability and submitted the issue of damages to the jury. The court held that the trial court may not direct such a verdict when the

evidence viewed most favorably to the defendant did not so overwhelmingly favor the plaintiff that a verdict for the defendant would have to be set aside.

The plaintiff states that "the only conflict in the evidence on any salient point relates to speed of the vehicles." He argues that "the defendant's contention that there is a sharp conflict in the evidence does not preclude a directed verdict where on the ultimate issue neither side of the conflicting testimony would justify a jury verdict opposite to the directed verdict." This is not the law. Pedrick v. Peoria & Eastern R. R. Co. (1967), 37 Ill.2d 494, 229 N.E.2d 504. The trial court cannot direct a verdict for the plaintiff on the issue of liability when there is a conflict in the evidence.

In the case at bar, the credibility of the witnesses, the questions of whether the plaintiff or the defendant was speeding at the time of the accident and whether either party was driving carelessly, in light of the weather conditions, raised issues of fact which should have been submitted to the jury. It was therefore error for the trial court to direct a verdict in behalf of the plaintiff on the issue of liability.

In view of our conclusion on this point, we do not reach the other grounds relied upon for reversing.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

ABSTRACT ONLY

*Egan, J., did not participate.

121.A.150
CHICAGO BAR
ASSOCIATION

56656-56657

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
JAMES REDDING (Impleaded),)
)
Defendant-Appellant.)

APPEAL FROM ABST
CIRCUIT COURT
COOK COUNTY

HONORABLE
DANIEL WHITE,
Presiding.

Per Curiam:

After a bench trial, James Redding, defendant, and Vaughn Hayes were found guilty of the offenses of theft and battery in violation of sections 16-1(a)(1) and 12-3, respectively, of the Criminal Code [Ill. Rev. Stat. 1971, ch. 38 pars. 16-1(a)(1), 12-3.]. Defendant was sentenced to consecutive terms of six months in the House of Correction on each of the two charges. He appeals. Hayes was sentenced to concurrent terms of six months and is not involved in this appeal.

The complaining witness testified that on August 13, 1971, she was about to enter her home on South Loomis Avenue, Chicago, after having visited a savings and loan association a short distance away. She was accosted in the alley by two youths, identified as the defendant and Hayes, who approached her from either side and knocked her to the ground. She testified that Hayes took her coin purse, containing several dollars, and ran down the alley; that the defendant, who had been seated on a garbage can, got up, looked down at her, then ran down the alley behind Hayes. The incident was observed by the witness' granddaughter who was playing in the next yard, and who knew the defendant. The complaining witness and her granddaughter both identified the defendant at a police lineup later that day.

The defendant and Hayes both testified that they were not in the vicinity of the complaining witness' house on the day in question, but that at the time of the alleged occurrence they were seated on the porch of Hayes' girl friend's house where they were later arrested by the police.

Defendant's first contention—that he was not proved guilty beyond a reasonable doubt—is without merit. The State's evidence, summarized above, if believed by the trier of fact, was clearly sufficient to prove defendant guilty beyond a reasonable doubt. People v. Morehead, 45 Ill. 2d 326, 259 N.E. 2d 8. Defendant's contention, raised for the first time on appeal—that he merely happened to be in the area where he observed the crime in question, and that being shocked he fled—not only directly contradicts his theory at trial but is totally incredible.

Defendant next contends that it was error for the court to have sentenced him for both the offenses of theft and battery. We agree. There is no evidence in the record to indicate that the conduct of the defendant and Hayes in knocking the victim to the ground was other than to effectuate the theft of the coin purse, which constituted but a single transaction on their part and which will support but a single sentence, for theft. The sentence imposed upon the conviction for battery must therefore be vacated. People v. Smith, ___ Ill. App. 3d ___, 290 N. E. 2d 261, 263.

For these reasons, the judgment of conviction and sentence for theft are affirmed. The judgment of conviction for battery is modified and the sentence entered thereon is vacated.

Affirmed as modified.

THIRD DIVISION

Presiding Justice Dempsey
did not participate.



58030

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	ABST
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
BARBARA J. FELTON,	)	HONORABLE SAUL A. EPTON,
	)	Presiding.
Defendant-Appellant.))	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Barbara J. Felton, hereafter called defendant, was indicted for the offense of murder in violation of Section 9-1 of the Criminal Code. Ill. Rev. Stat. 1969, ch. 38, par. 9-1. She was found guilty after a bench trial and was sentenced to a term of 14 years to 14 years and one day. Defendant appealed, arguing that the evidence failed to establish that she was guilty of murder beyond a reasonable doubt. Defendant seeks a reversal of the conviction or, in the alternative, a reduction in the degree of the offense from murder to the included offense of voluntary manslaughter or involuntary manslaughter.

The testimony, as adduced at trial, follows: Letha Perlite testified that on April 3, 1971, she was with the defendant and the defendant's boyfriend, David Wright, in Wright's apartment. At approximately 2:30 A.M., she was in the apartment with the defendant and Mr. Wright and overheard an argument relating to whether or not Mr. Wright was in fact the father of the child that the defendant was carrying. The argument consisted of words only and no blows were struck. Miss Perlite and the defendant walked out of the apartment door. As they went through the door, the apartment door closed automatically. Miss Perlite looked back as the door was closing and observed the deceased standing by the door to his room. The defendant then pushed Miss Perlite to the side, turned and fired one shot through the door. Miss Perlite and the defendant then proceeded

upstairs. As they were going up the stairs, Miss Perlite heard David Wright holler, "Jean shot me." The defendant changed her shoes and went out the back door. Several hours later, the defendant returned and told Miss Perlite that she had killed David and that the relatives wanted to put her in jail. David Wright died of a bullet wound of the abdomen.

Ollie Thomas, a Chicago Police officer, testified that he arrived on the scene and observed David Wright, who he had previously known, lying on the floor in the corner of his apartment. He interviewed Wright at Provident Hospital and was told, "My girl friend shot me." Further, Wright gave his girl friend's name as Barbara Jean. Officer Thomas found a .25 caliber casing approximately 12 inches from the front door of the apartment.

Charles Boucher testified that he was the Chicago Police investigator assigned to the case in question. On April 3, 1971, he arrested the defendant and advised her of her constitutional rights. The defendant informed him that she could not have shot the deceased because she was with Elam Biggs on the night in question.

The defendant testified that in the early morning hours of April 3, she was with David Wright at the Jazz Club. They returned to their apartment and an argument ensued as to whether or not the deceased was the father of the child she was carrying. The argument consisted of words only with no blows being struck. She and Miss Perlite left the apartment. As they walked out the door, the defendant testified that she turned and fired one shot through the door to scare the deceased because he usually followed her after an argument. After shooting through the door, she called to the deceased and received no response. She then went upstairs and asked neighbors to call down to her apartment and discovered that the deceased had been shot. She testified that the gun belonged to Mr. Wright and that she put it in her pocketbook that evening at approximately 12:00.

The foregoing facts could not justify a conviction for voluntary

manslaughter. Voluntary manslaughter is the killing of an individual without lawful justification where one is acting under a sudden and intense passion resulting from serious provocation. Ill. Rev. Stat. 1969, ch. 38, par. 9-2. The facts in the case at bar demonstrate that an argument between the defendant and the deceased occurred for some length of time. The argument consisted of words only with no blows being struck. The rule has long been established in this State that mere words alone are insufficient provocation to justify voluntary manslaughter. People v. Williams, 6 Ill. App.3d 713, 286 N.E.2d 570; People v. Lowe, 122 Ill.App.2d 197, 258 N.E.2d 370.

Murder and the lesser included offense of involuntary manslaughter are distinguished only in terms of the mental state required. Murder is the killing of an individual without lawful justification where, in performing the acts which caused death, the person either intends to kill or do great bodily harm, or knows that such acts create a strong probability of death or great bodily harm. Ill. Rev. Stat. 1969, ch. 38, par. 9-1. Involuntary manslaughter is the killing of an individual without lawful justification where the acts, whether lawful or unlawful, which caused the death are such that are likely to cause death or great bodily harm to some individual and the acts are performed recklessly. Ill. Rev. Stat. 1969, ch. 38, par. 9-3.

Murder requires an intent to kill or do great bodily harm, or knowledge that the acts create a strong probability of such a result, while the conviction for involuntary manslaughter requires only reckless conduct which causes death. Recklessness is defined in our Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 4-6):

"4-6 RECKLESSNESS. A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

Involuntary manslaughter requires no felonious intent and the only mental state required is the conscious disregard of a substantial and unjustifiable risk.

In the case at bar, the facts as adduced at trial demonstrate that the defendant carried a loaded weapon. After leaving the apartment in which the deceased remained, she turned and fired one shot through the door. By her testimony, the shot was fired to scare the deceased. At the time she fired the shot, the exact whereabouts of the deceased within the apartment was unknown to her. The firing of a gun through a closed doorway is a gross deviation from the standard of care which a reasonable person would exercise and therefore constitutes recklessness. People v. Bembroy, 4 Ill.App.3d 522, 281 N.E.2d 389.

We find that, under the evidence as adduced at trial, defendant was not proven guilty of the crime of murder beyond a reasonable doubt. Defendant was, however, proven guilty of the crime of involuntary manslaughter beyond a reasonable doubt. Under the power granted this court by Supreme Court Rule 615(b)(3), Ill. Rev. Stat. 1969, ch. 110A, par. 615(b)(3), we reduce the degree of the offense, for which the defendant was convicted, from murder to involuntary manslaughter. See People v. Kurtz, 37 Ill.2d 103, 224 N.E.2d 817; People v. Taylor, 3 Ill.App.3d 313, 278 N.E.2d 469. In view of the fact that the sentence imposed in the trial court exceeds the statutory maximum authorized for involuntary manslaughter, it is necessary that the defendant be resentenced. The trial court is in a far better position to determine the proper sentence than we are.

The judgment of the trial court is therefore modified to adjudge the defendant guilty of involuntary manslaughter and the cause is remanded to the Circuit Court of Cook County for resentencing.

JUDGMENT AFFIRMED AS MODIFIED:
REMANDED WITH DIRECTIONS.



No. 57472

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
EDWARD THIGPEN,	)	HONORABLE
	)	REGINALD J. HOLZER
Petitioner-Appellant.	)	PRESIDING

PER CURIAM (Fifth Division, First District):

Petitioner was convicted of unlawful sale of a narcotic drug after a bench trial and was sentenced to a term of ten to fifteen years. He appealed and on March 10, 1970, this court affirmed his conviction. People v. Thigpen, 121 Ill.App.2d 341, 257 N.E.2d 493 (Abstract only). On January 7, 1971, petitioner filed a pro se post-conviction petition contending (1) he was denied due process of law in that the indictment failed to set forth all necessary elements of the offense of unlawful sale of a narcotic drug; (2) he acted only as an agent for the buyer and therefore was a victim of police entrapment; (3) he was denied a transcript of the Grand Jury testimony of a witness; (4) he was given incompetent representation by the Public Defender of Cook County; (5) he was denied a fair trial by the prosecution's tactics of displaying and reading documents pertaining to his past criminal record; and (6) he was denied equal protection of the law by being given a greater sentence than that of his co-defendant.

The Public Defender of Cook County was appointed to represent petitioner and on February 12, 1971, petitioner filed an amendment to his petition alleging that he was being deprived of proper post-conviction relief by the appointment of the Public Defender as counsel because one of the main contentions in his petition was incompetent representation by the office of the Public Defender of Cook County at the trial. On September 13, 1971, upon motion of the State, petitioner's post-conviction petition was dismissed without an evidentiary hearing. He appeals the order of dismissal.

The Public Defender of Cook County, who was appointed to represent petitioner on this appeal, has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states the only possible issue on appeal would be whether petitioner was denied procedural due process of law at the post-conviction proceedings and it concludes that an appeal on this issue would be without merit. The defendant was served with a copy of the motion and brief on February 27, 1973. He was informed that he could file any points he might choose in support of his appeal before April 30, 1973. He has not responded.

Petitioner's argument that he was acting only as an agent for the buyer and was therefore a victim of police entrapment was raised in his direct appeal where it was contended that on this account he was not proven guilty beyond a reasonable doubt. There having been a review of this issue by direct appeal, petitioner cannot have it reconsidered in his post-conviction proceeding. People v. Walker, 6 Ill.App.3d 909, 286 N.E.2d 812. Petitioner alleges also that: (1) the indictment failed to set forth all necessary elements of the offense, (2) he was denied a copy of the Grand Jury testimony of certain witnesses, and (3) he was deprived of a fair trial by the prosecution's tactics of displaying and reading documents pertaining to his past record. The basis for each of these allegations was known from the original trial record and each could have been raised in the defendant's direct appeal. It is a settled rule that when a conviction has been appealed, any issue which could have been reviewed in the direct appeal cannot be raised in a post-conviction hearing. People v. Ashley, 34 Ill.2d 402, 216 N.E.2d 126.

Petitioner's contention that he was given incompetent representation by the office of the Public Defendant of Cook County at trial was a conclusory statement devoid of any facts or specific alleged acts of incompetency and as such did not require an evidentiary

hearing. People v. Hill, 39 Ill.2d 61, 233 N.E.2d 546. Moreover, the record demonstrates that the petitioner was represented at trial, not by the Public Defender of Cook County, but by court-appointed, private counsel.

His argument that he was denied equal protection of law by being given a greater sentence than that of his co-defendant does not present a constitutional question, and, in any event, the co-defendant was found guilty of a different offense (conspiracy) than that of the petitioner (sale). In the case at bar, the trial court properly dismissed petitioner's post-conviction petition without an evidentiary hearing because all matters raised therein were without merit either because they were or could have been raised on direct appeal or did not present a constitutional question.

In his amendment petitioner argues that other counsel should have been appointed to represent him at the post-conviction hearing does not present a constitutional issue since his trial representation was by court-appointed, private counsel and not the Public Defender.

A review of the entire record leads to the conclusion that the petitioner was not denied procedural due process. At the hearing on the State's motion to dismiss the post-conviction petition, the Assistant Public Defender representing petitioner stated that he had personally interviewed petitioner, had read the trial transcript, had prepared an abstract of that transcript and had read petitioner's pro se post-conviction petition. He presented petitioner's arguments and then stated that in his opinion, he found no violation of petitioner's constitutional rights. Petitioner's counsel at the post-conviction hearing complied with all the requirements of People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566, and Supreme Court Rule 651, Ill.Rev. Stat. 1971, ch. 110A, par. 651.

We have examined the record and concur in the opinion of the Public Defender that there are no points raised in the petition which are "arguable on their merits". In our opinion the appeal is "wholly frivolous".

Accordingly, the motion of the Public Defender of Cook County to withdraw is allowed and the judgment dismissing the post-conviction petition is affirmed.

AFFIRMED

(Publish Abstract Only)

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ABST

57722)
57723)

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE CIRCUIT
)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
vs.)	
)	
ROBERT L. DAVIS,)	
	)	Hon. Earl E. Strayhorn,
Defendant-Appellant.	)	Presiding.

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Robert L. Davis (defendant) entered a negotiated plea of guilty to the offense of armed robbery in violation of section 18-2 of the Criminal Code, and was sentenced to a term of two years, four months and sixteen days in the penitentiary, considered served. (Ill.Rev.Stat. 1967, ch.38, par.18-2.) He appeals.

The Illinois Defender Project has filed in this court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, in which counsel states that "there is no meritorious issue in this appeal." Copies of the brief and motion were forwarded to defendant and he was allowed an additional 45 days within which to file any points he desired to support the appeal. Defendant has filed no response.

In its brief appellate counsel states that any contention raised with regard to defendant's sentence, the admonishments given him prior to the acceptance of his plea of guilty, the factual basis for the plea, or the length of time elapsed before a hearing was held on the matter, would be without merit. After a review of the record in the light of those points, we agree.

*Mr. Presiding Justice Burke did not participate.

Upon independent review of the entire record in discharge of our duty under the Anders decision, we have discovered two minor matters of conflict in the record, neither of which would support an appeal. First, a variance exists between the date of the offense as alleged in the indictment and the date provided by the State in the factual basis underlying the plea of guilty. Such variance under the circumstances of this case is not fatal, and the indictment is consequently sufficient. In re Interest of Landrus, 7 Ill.App.3d 556, 288 N.E.2d 94.

Secondly, although the report of proceedings reveals that the trial court sentenced defendant to a minimum term of two years, the judgment order does not reflect that fact. Such variance would not support an appeal since, by statute in effect at the time the offense was committed, the minimum term to which an offender could have been sentenced was two years. (Ill.Rev.Stat. 1967, ch.38, par.18-2.) Further, since defendant was in fact sentenced for the period of time he actually served pending a hearing on this matter, the question is moot.

For these reasons we conclude that the appeal is frivolous and wholly without merit. The Illinois Defender Project is accordingly allowed to withdraw as defendant's appellate counsel and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

m. [illegible] [illegible] [illegible] [illegible] [illegible]
Abstract Only.

58109

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DON ALFRED AUSTIN,	)	Hon. Louis B. Garippo,
	)	Presiding.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

On September 1, 1971, Don Alfred Austin (defendant) pleaded guilty to three counts of aggravated battery (Ill. Rev.Stat. 1969, ch.38, par.12-4) and was sentenced to three concurrent terms of five to ten years. On September 29, 1971, defendant filed a notice of appeal and the public defender was appointed counsel for defendant for purposes of appeal.

The public defender has filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738, in which he alleges that the only basis for appeal would be whether the trial court fully admonished the defendant as to the significance and consequences of his change of plea from not guilty to guilty. The brief concludes that an appeal on this issue would be frivolous, without merit and could not possibly be successful.

Defendant was served with copies of the motion and brief and he was given additional time within which he could file any points he might choose in support of the appeal. Defendant has filed a written response in which he states in effect that he was tricked into entering a plea of guilty because of threats by his own attorney and that the lawyer misrepresented to him

*Mr. Presiding Justice Burke did not participate.

the total length of the sentence which he could receive. We may not consider these allegations since they are not a part of the trial record before us and could be raised only by a post-conviction petition. However, we have examined the Report of Proceedings in connection with the acceptance of the plea of guilty by the trial court. As hereafter shown, Rule 402 of the Supreme Court was carefully and substantially complied with by the trial judge and none of the proceedings before the court indicate the slightest foundation for the charges now raised by defendant.

Illinois Supreme Court Rule 402 sets forth the requirements which must be substantially complied with by the trial judge in accepting a plea of guilty.

Our examination of the record discloses that the requirements of Rule 402 were substantially complied with. We concur in the opinion of defendant's counsel that an appeal on this ground would be frivolous. Further, our examination of the record does not disclose any additional possible grounds of appeal.

The motion to withdraw is allowed and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

on appeal to the Supreme Court per

Abstract Only.



56066

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	ABST
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
ALONZO BONNER,	)	HONORABLE PHILIP ROMITI,
	)	Presiding.
Defendant-Appellant.))	

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Defendant, Alonzo Bonner, was found guilty after a bench trial of the offense of murder, in violation of Section 9-1 of the Criminal Code, and was sentenced to a term of 20 years to 40 years in the penitentiary. (Ill. Rev. Stat. 1967, ch. 38, par. 9-1.) He appeals, contending that he was not afforded an adequate hearing on his motion to suppress a statement made to the police; that the People failed to rebut evidence allegedly establishing self-defense; and that the People failed to establish the element of malice, failing therefore to prove him guilty of murder beyond a reasonable doubt.

At trial, Lawrence Smith testified for the People that on the afternoon of August 31, 1969, he had been drinking beer in the vicinity of 1922 Howe Avenue in Chicago in the company of defendant, deceased (David Strube), defendant's brother (Charles Bonner), a man called "Jesus" (Patrick Mahoney), and several other men. At about 10:30 P.M. on that date, the witness, defendant's brother, an unnamed woman, and "Jesus" were in the latter's apartment at 1920 Howe drinking beer, at which time "Jesus" left the apartment. A few minutes later, the witness heard several gunshots, and he, the woman, and defendant's brother went downstairs where defendant was observed by the witness coming out of "the gangway" with a gun in his hand. The witness testified that defendant stated: "I just shot somebody."; that the witness asked defendant: "Who?";

and that defendant made no response. The police arrived shortly and the witness went into the alley in the 1900 Block of Orchard Avenue, where he saw the deceased and was questioned by the police concerning the shooting. The witness later saw defendant at his (witness') home. The witness testified that, of the people he was drinking with on that day, he had previously known only defendant and defendant's brother.

Smith testified that on September 1, 1969, defendant came to his home in the afternoon and asked the witness to accompany him to the residence of Mr. Cuevas. At the Cuevas residence, defendant gave Cuevas the gun which the witness saw in defendant's hand the previous night, and Cuevas gave defendant \$5. The witness further testified that, at approximately 11:00 A.M. on September 3, 1969, the police took him to the police station; that, about five or six hours later, he took the police to Cuevas' residence where the police recovered the gun; and that the witness was returned to the police station.

Chicago Police Officer Jurczenko testified for the People that at approximately 10:40 P.M. on August 31, 1969, he proceeded to the alley in question, where he observed the deceased lying face down in a pool of blood. The area was well lighted, and a search of the deceased and of the immediate vicinity produced no weapon. Of the four to six people present at the scene, the officer spoke only to two persons who were attending the victim. The deceased was pronounced dead on arrival at a hospital.

Santos Cuevas testified for the People that on September 1, 1969, defendant, in the presence of Lawrence Smith, gave the witness the gun in question in return for a loan of \$5, and that two days later the police took the weapon from him. Both Cuevas and Smith identified the weapon at trial.

During the course of the trial, the court heard evidence on defendant's motion to suppress a statement made by defendant

to Officer Frank Heatley, the basis of the motion being the lack of "the Miranda warnings"; the defense counsel expressly withdrew a reference in the motion that the statement was also being challenged on the ground that it was involuntarily given.

At the hearing on the motion, Officer Heatley testified that he arrested defendant at police headquarters on September 3, 1969, at about 4:30 or 5:00 P.M., and the officer gave inconsistent testimony as to when he first saw defendant on that date. He further testified that, between 4:30 P.M. and 6:00 P.M. on that date, after defendant had been warned of his constitutional rights in accordance with the Miranda decision (which rights the defendant stated he understood) and in the presence of no police officer other than the witness, defendant made a statement to the officer concerning the shooting as follows:

On the night of the shooting, he and the deceased argued over a loan of money; the two men walked through the gangway of the building and into an alley; defendant was walking ten feet behind the deceased, who had his back to defendant; defendant heard a "rattle" or a "click" and thought that the deceased had a knife; defendant pointed his gun low at the deceased and fired one shot, striking the deceased in the leg; the deceased made a half turn toward defendant and defendant then raised his gun and fired two more shots toward the upper portion of the deceased's body; the deceased fell, and defendant turned and walked through the gangway. The court noted that the proper Miranda warnings had been given, and denied the motion to suppress.

The trial of the cause continued and Officer Heatley testified that he received a radio communication on the night of the shooting; that he observed the deceased in the hospital; and that he also observed the scene of the shooting. The officer testified that, when he arrived at police headquarters on September 3, 1969 sometime prior to 4:30 P.M. pursuant to a telephone call at his home, he observed defendant, Lawrence Smith, and Santos Cuevas at the station. The witness later advised defendant of his con-

stitutional rights, after which the witness held a conversation with defendant between 5:30 and 7:00 P.M., at which time defendant related the foregoing statement. The officer testified that he showed defendant the weapon involved after defendant made his statement, and that defendant stated that it was the weapon used in the shooting.

Police Officer Robert Friedman testified that he took Lawrence Smith into custody on September 3, 1969; that Smith led the officer to Cuevas' residence, where he received the gun in question from Cuevas; and that defendant was arrested between 1:00 and 3:00 P.M. on September 3rd.

It was stipulated that deceased was shot in the head and in the upper left rear thigh (there also being evidence that the deceased was shot three times); that a bullet removed from the body of the deceased was fired from the gun entered into evidence at trial; that the deceased died as a result of a gunshot wound to the head; that the deceased was 19 years old, caucasian, weighed 197 pounds, and was 6 feet, 3 inches tall; and that a chemical analysis revealed the presence of no alcohol in the deceased's blood, but that it did reveal the presence of morphine in the bile. No evidence was offered in defendant's behalf.

Defendant's argument that he was not accorded an adequate hearing on his motion to suppress is without merit. It should be pointed out initially that the question of the voluntariness of the statement made to Officer Heatley was expressly waived by defense trial counsel. Nevertheless, the sole statement made by defendant to the police was that made to Officer Heatley, and the record shows that he was fully advised of his constitutional rights, as required by Miranda v. Arizona, 384 U.S. 436, prior to the making of his statement, and that he stated he understood his rights in that regard. People v. Horton, 126 Ill.App.2d 401, 409-410, 261 N.E.2d 693. De-

fendant did not take the stand at the hearing on the motion, and it does not appear of record that any other witness existed who was material to the giving of defendant's statement, or that there were any "peculiar circumstances" existing which would have absolved defendant from failing to object at the hearing to the People's failure to call any witness other than Officer Heatley. Ill. Rev. Stat. 1971, ch. 38, par. 114-11(d); People v. Harper, 127 Ill.App.2d 420, 262 N.E.2d 298.

The cases cited by defendant in support of his position are inapplicable to the circumstances in the case at bar: See e.g., People v. Strader, 38 Ill.2d 93, 230 N.E.2d 569; People v. Costa, 38 Ill.2d 178, 230 N.E.2d 871.

Defendant further contends that the People failed to rebut the theory of self-defense which was injected into the case by Officer Heatley's testimony concerning the statement given to him by defendant, thereby entitling defendant to a discharge.

Where evidence of self-defense is raised at trial, whether raised directly by defendant or through evidence adduced by the People, it is incumbent upon the People to rebut such evidence, unless defendant's own statements and actions, or other circumstances, impeach such theory of self-defense, in which case the trier of fact is not obliged to believe that defendant acted in self-defense. People v. Warren, 33 Ill.2d 168, 210 N.E.2d 507.

While the testimony of Officer Heatley relative to the statement given by defendant does raise a threshold question of self-defense (to the effect that defendant thought that the deceased anticipated using a knife against him), defendant's other actions and other circumstances in the case impeach the theory of self-defense, so that the trial court was not required to believe that defendant thought that the deceased had a knife or that defendant acted in self-defense.

No knife was found either on the person of the deceased or at the scene of the shooting. Defendant's argument by inference that

the knife may have been disposed of by someone who arrived at the scene before the investigating officer is conjecture. Furthermore, militating against the evidence in the Coroner's physician's report corroborating defendant's statement to the officer that he fired a shot into the deceased's leg, is the evidence in defendant's statement that he thereafter raised the gun and fired two more shots into the upper portion of the deceased's body. Defendant fled the scene and offered no help to the victim, and he either loaned or sold the gun used in the shooting the following day, in the presence of Smith, who had also been present when defendant stated that he had shot someone immediately after the shooting.

Defendant was walking ten feet behind the deceased, who had his back to defendant when the shooting occurred; defendant at that time was following the deceased; there is no evidence of any prior difficulties between the two men, and, other than the evidence that the deceased had used narcotics sometime prior to the shooting, there was no evidence that he was of a belligerent nature, had carried a knife or had caused trouble in the past, or the like. Finally, it does not appear that defendant made any attempt to turn himself over to the police after the shooting; on the contrary, the police sought him out three days later, after he had been implicated in the shooting. See People v. Johnson, 108 Ill.App.2d 150, 247 N.E.2d 10, relative to the reviewing court's consideration of the jury's finding as to the defense of self-defense.

The cases of People v. Jordan, 4 Ill.2d 155, 122 N.E.2d 209, and People v. Hall, 118 Ill.App.2d 160, 254 N.E.2d 793, cited by defendant, are distinguishable on their facts from the case at bar.

As to the final point raised by defendant (that the People failed to prove malice and therefore did not prove him guilty of murder beyond a reasonable doubt), defendant's argument presupposes that the trial court must necessarily have found that defendant believed that the deceased had and was intending to use a knife, and

that the sole issue to be resolved by the trial court was whether defendant acted reasonably or unreasonably in that belief. However, as noted above, the facts here were such that the trial court could have found that defendant did not believe that the deceased was carrying a knife at the time of the shooting, and that he did not act out of concern for his own safety in shooting the deceased, and that therefore the question of manslaughter does not arise.

The intent necessary to constitute the act of taking a life as murder may be found from the character of the act itself and the attendant circumstances. People v. Spagnola, 123 Ill.App.2d 171, 260 N.E.2d 20. There were sufficient facts in the instant case which impeached the theory of self-defense and from which the trier of fact could reasonably have found defendant guilty of murder.

For these reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Justice Downing did not participate.



56789

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DWIGHT CAVIN,	)	Hon. Louis B. Garippo,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

This appeal brings before us a most amazing legal anomaly. A defendant, found guilty of three felonies by admittedly sufficient evidence, contends here, for the first time, that his rights have been curtailed because he was entitled only to ten, instead of 20, peremptory challenges of prospective jurors.

Dwight Cavin (defendant) was indicted for murder (Ill.Rev. Stat. 1969, ch.38, pars. 9-1 and 9-1(a-2),) attempt murder (Ill. Rev.Stat. 1969, ch.38, par.8-4) and aggravated battery (Ill.Rev. Stat. 1969, ch.38, pars.12-4 and 12-4(b-1).) After a jury trial, he was found guilty on all three charges and sentenced to 20 to 40 years in the penitentiary. He appeals.

In this court, defendant raises only two issues. He urges that he was denied a fair and impartial trial with reference to the selection of the jury and also that the grand jury which indicted him was improperly selected. No point is raised relative to sufficiency of the evidence to prove guilt beyond reasonable doubt. Therefore, we need not state the facts or summarize the testimony.

Regarding selection of the jury, defendant contends that the court should have excused Jurors Stewart and Rizzotto for

cause. This having been denied, he was required to excuse both of them by peremptory challenge. This exhausted defendant's ten peremptory challenges and therefore he was obliged to accept Juror Ahern; a juror now termed objectionable. The premises upon which this finespun deductive argument rests are not supported by the record.

We need not detail the questions put to Jurors Stewart and Rizzotto upon voir dire. In the case of Juror Stewart, no challenge for cause was ever made by defendant. The juror was excused by the court in response to a peremptory challenge by defendant's counsel. Defendant should first have moved to excuse Juror Stewart for cause. (People v. Adams, 4 Ill.2d 453, 458, 123 N.E.2d 327.) If this motion had been granted, defendant would then have used only nine peremptory challenges; and then, even under his theory that he was limited to 10 peremptory challenges, he could peremptorily have excused Juror Ahern, whom he now finds objectionable.

In addition, it is notable that trial counsel for defendant did not raise this point in any manner at the trial. Defendant never requested that Juror Ahern be peremptorily excused. Defendant never asked the trial court to rule upon the number of peremptory challenges to which he was entitled. Thus, this issue was never presented to or considered by the trial court and it must, therefore, be deemed waived. This principle has been stated many times by our reviewing courts. Note especially the recent decision in People v. McAdrian, 52 Ill.2d 250, 253, 254, 287 N.E.2d 688. In People v. Morris, 6 Ill.App.3d 136, 285 N.E. 2d 247, this court had occasion to state the principle in connection with a point first raised by a defendant on appeal

regarding alleged violation of his rights by use of a stipulation as part of the proof against him. See 6 Ill.App.3d at 139.

In Morris, although the situation was completely suited to application of the doctrine of waiver, we proceeded to consider the merits of defendant's contention. We will not do so in the case at bar for two ample reasons. First, even assuming that defendant's position is correct, and that he was limited to 10 peremptory challenges, he himself exhausted at least one of his peremptory challenges by not first using a challenge for cause in the case of Juror Stewart. The trial court had no control over the manner in which defendant saw fit to expend his peremptory challenges.

Secondly, we find no prejudice to defendant resulting from inclusion of Juror Ahern. Reading the record in this regard, we conclude that the challenge for cause against Juror Ahern was properly decided within the discretion of the court. (See People v. Harris, 32 Ill.2d 552, 556, 232 N.E.2d 721.) Actually, a fair reading of the answers given to all questions by this juror convinces us that he was fair and impartial and that no prejudice resulted to defendant from his inclusion on the jury. To say that participation by Juror Ahern caused defendant's conviction or that defendant would not have been convicted with a different juror is to indulge in pure speculation. This hypothesis is rendered more untenable by the fact that defendant here does not challenge the sufficiency of the evidence to prove his guilt beyond reasonable doubt.

Prior to trial, counsel for defendant filed a written motion to quash and dismiss the indictment on the ground that the grand jury which returned it was illegally constituted. Counsel for defendant urges now that "the trial court was informed that the parties would stipulate to the record on a hearing being held before another judge." Actually, the record shows that counsel for defendant tendered his written motion to dismiss to the court. He informed the court that the same motion had been filed in other cases. He also said to the court, "We have a preliminary understanding with the State's Attorneys that they will, in most of the cases, have to stipulate to the record on the hearing before Judge Dolezal in support of the motion." The court then stated that the motion to dismiss the indictment would be denied without prejudice so that it could be raised at some later time. Counsel for defendant assented to this. However, the motion to quash and dismiss was apparently never raised again and was never subsequently ruled upon again by the trial court. Thus, it remains denied "without prejudice." No argument on the point is presented in defendant's brief. Therefore, the point is waived, Supreme Court Rule 341(e)(7) and 612(j), 50 Ill.2d Rules 341(e)(7) and 612(j).

Finding no error in the record as presented to us, the judgment appealed from is affirmed.

Judgment affirmed.

EGAN, J., and HALLETT, J., concur.



NO. 56896

12 I.A.³ 247
APPEAL FROM

ANNE KERR,

Plaintiff-Appellant,

vs.

CITY OF CHICAGO, a municipal corporation, JAMES M. ROCHFORD, JAMES J. RIORDAN, and Chicago Police Officers JOHN DOE,

Defendants-Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
ABRAHAM W. BRUSSELL,
PRESIDING.

ABST

PER CURIAM (Second Division, First District):

On August 25, 1970, the plaintiff Anne Kerr filed a suit against the City of Chicago and certain Chicago police officers that contained three counts alleging actual and exemplary damages she claimed were sustained by her on August 28, 1968. On its motion, the suit against the City of Chicago was dismissed because of plaintiff's failure to file the complaint within one year as required by Ill. Rev. Stat. 1967, ch. 85, par. 8-101. She appeals contending that the one year statute of limitations is unconstitutional. This contention is based on the allegation in Count I of plaintiff's complaint that:

* * * The statute of limitations barring suits against Illinois municipal corporations beyond a one year period, S.H.A., ch. 86, §8-101, is unconstitutional under both section 22 of article IV and section 2 of article 2 of the Illinois Constitution as well as the Fifth and Fourteenth Amendments to the Constitution of the United States.

This contention has been authoritatively settled by Fanio v. John W. Breslin Co. (1972), 51 Ill. 2d 366, 368, 282 N.E. 2d 443. Following King v. Johnson (1970), 47 Ill. 2d 247, 265 N.E. 2d 874, which upheld the six months notice provisions of paragraph 8-102, Fanio explicitly held the one year limitation of paragraph 8-101 constitutional as against the claim of special legislation and legislation without a rational basis, specifically distinguishing the cases relied upon by plaintiff in her brief. See, also, Bennett v. Geeler (First District,

First Division: April 2, 1973), General No. 57127, slip opinion, page 3. Fanio also held that paragraph 8-101 does not deny the equal protection guaranteed by the Fourteenth Amendment of the United States Constitution and stated explicitly that the rationale of Harvey v. Clyde Park District (1965), 32 Ill. 2d 60, 203 N.E. 2d 573, on which plaintiff relies, was distinguishable on its facts. Accordingly, paragraph 8-101 is constitutional and the judgment is affirmed.

Judgment affirmed.

Publish abstract only.

57034

ABST

PEOPLE OF THE STATE OF ILLINOIS)
ex rel. LEONITA MOORE,)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
vs.)
) HONORABLE MAURICE W. LEE,
SPENCER COLEMAN,) Presiding.
)
Defendant-Appellant.)

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Defendant was originally charged and convicted upon his plea of guilty of paternity on February 25, 1965. Thereafter, a complaint charging non-support in violation of Ill. Rev. Stat. 1969, ch. 68, par. 24, was filed on July 22, 1969. On October 26, 1971, the defendant, in a bench trial, was found guilty of non-support and was sentenced to serve thirty days in the House of Correction. On appeal, the defendant argues that he was denied his right to a fair and impartial trial.

At the trial held on October 26, 1971, the transcript shows that, immediately upon the case being called, the attorney representing the complainant informed the trial judge that the case concerned "Paternity on the arrearage, Your Honor." The trial court inquired of the defendant if he had made any payment or had any payment with him. The complainant replied that the defendant had paid nothing. The court then sentenced the defendant to 60 days in the House of Correction. The defendant was not represented by counsel. Thereafter, the defendant informed the trial judge that he had not worked since the previous September and had been ill. The trial judge then reduced the sentence to 30 days in the House of Correction.

The defendant was charged with the criminal offense of non-support, in violation of Ill. Rev. Stat. 1969, ch. 68, par. 24, under which he could be sentenced to a maximum term of one year in jail and a fine of \$600. The common law record shows and the parties in

their briefs agree that, at the hearing on October 26, 1971, the defendant was found guilty of, and sentenced on, this charge. Since defendant was charged with a misdemeanor, the possible punishment for which was one year in jail, he was entitled to certain fundamental, constitutional rights. For example, the transcript shows that defendant was not informed of his right to counsel or informed of his right to a jury trial. The transcript shows that defendant was without counsel and that no sworn testimony was heard. Defendant was found guilty and sentenced before he had said a word. Under these circumstances, we hold that defendant was denied basic and fundamental constitutional rights.

We note that there is an inconsistency as to the nature of the case before the trial court at the hearing on October 26, 1971. The transcript of the hearing shows that, immediately upon the calling of the case, counsel for complainant described the case to the trial judge as being one involving "Paternity on the arrearage, Your Honor." On the other hand, the common law record and the appellate briefs of both parties all agree that what happened at the hearing was that defendant was convicted of, and sentenced upon, the criminal offense charged in the complaint of non-support which had been filed on July 22, 1969. The trial judge may well have been misled into thinking that he was exercising his contempt powers for defendant's persistent non-compliance with the several child support orders. It is also possible that both parties and the common law record are mistaken as to the nature of the case which was heard on October 26, 1971. We feel bound by the common law record. In any event, these details can be clarified on remand of this case.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Justice Downing did not participate.



57211

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County
vs.)	
	)	Honorable
JOHNNY A. ROBERTS,	)	Robert J. Collins,
Defendant-Appellant.	)	Presiding.

PER CURIAM * (SECOND DIVISION, FIRST DISTRICT):

ABST

Johnny A. Roberts (defendant) was indicted in a five count indictment with three counts of aggravated battery, one count of deviate sexual assault and one count of attempt murder, in violation of Sections 12-4, 11-3 and 3-4, respectively, of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, pars. 12-4, 11-3, 8-4.) The trial court found him not guilty of attempt murder and guilty of all other charges. On appeal he contends that the State failed to prove him guilty beyond a reasonable doubt.

The State's evidence showed that the complaining witness (a 15 year old youth) was forced by defendant at gunpoint and knifepoint to perform a deviate sex act upon defendant and that shortly thereafter the defendant shot him in the head with a small caliber pistol. The defendant's evidence was that the sex act was performed by the complaining witness voluntarily and without force, and that the subsequent shooting of the complaining witness was an accident.

We have examined the record and briefs in this case and have determined that no error of law appears, that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt on both charges. A full opinion would have no precedential value. This memorandum opinion is filed pursuant to Supreme Court Rule 23. (Ill. Rev. Stat. 1971, ch. 110A, par. 23, 1972 Supp.)

The judgments of the circuit court of Cook County are accordingly affirmed.

JUDGMENTS AFFIRMED.

PER CURIAM.

* HAYES, J. took no part



55678

ABST

ROBERT E. GORDON and)	
MARVIN A. BRUSTIN,	)	APPEAL FROM THE
Plaintiffs-Appellees,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
SAFEWAY INSURANCE CO.,	)	HONORABLE
an Illinois Corporation,	)	NATHAN J. KAPLAN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM * (SECOND DIVISION, FIRST DISTRICT):

This is an action, filed on September 20, 1969, by two attorneys against an insurance company to enforce an attorney's lien against a \$5,000 settlement allegedly made to their client (one Clifford Daniel) after notice of lien had been properly served on the insurer. Defendant answered, but upon subsequent failure to appear, judgment by default was entered against it for \$1,666.66, one third of the \$5,000 settlement. Defendant's petition to vacate the judgment under section 50(5) of the Civil Practice Act (Ill. Rev. Stat. 1969, ch. 110, sec. 50(5)), though brought within 30 days after entry, was denied; defendant appealed.

The "Notice of Attorney's Lien" notified Safeway that Daniel had "agreed to pay as compensation for services rendered and to be rendered a sum equal to one third of whatever amount that may be recovered from said claim by suit, settlement or otherwise."

On October 20, 1969, defendant filed its appearance on a form on which the words "APPEARANCE AND JURY DEMAND" were printed in bold letters, after which there appears an asterisk and a footnote at the bottom of the form referring to this asterisk, stating: "Strike demand for jury trial if not applicable". Nothing on the form was struck or crossed out, but the clerk's stamp shows that fees of \$5.00 and \$1.00 only were paid and the form was not stamped by the clerk to indicate that a jury was demanded.

The clerk did stamp the document "Affidavit not filed" (referring to the attorney's "Affidavit of Compliance").

On November 10, 1969, defendant answered by denying "any settlement" was made with Clifford Daniel and stating "that the amount alleged was paid to satisfy a judgment returned in Georgia" and that they "do believe that the plaintiffs herein perform no service for the aforesaid Clifford Daniel and as such are not entitled to any compensation for such services." On June 26, 1970, a default judgment was entered against defendant Safeway for \$1,666.66, and on July 24, 1970, defendant filed its petition to vacate on the grounds that it had filed a jury demand on October 20, 1969; that defendant had a meritorious defense in that plaintiff did not perform any services for Daniel; and "that through inadvertance [sic] the date for trial of this case did not appear on the docket of the attorneys for the defendant." This motion was denied October 30, 1970. On the same date defendant filed a petition for rehearing, which was denied after a hearing by the trial court on November 23, 1970.

The first issue is whether the trial court properly exercised its discretion in denying the defendant's motion to vacate under section 50(5) of the Civil Practice Act. The practice notes to section 50(5) state in part:

"The deletion of the requirement that a motion to vacate must be supported by affidavits showing good cause does not mean that good cause need not be shown. Quite the contrary. A bare motion to vacate, without more, is insufficient. Good cause must appear or be made to appear of record."

While the Supreme Court has mandated a liberal policy with respect to vacating default judgments under Section 50(5) of the Civil Practice Act in People ex rel Reid v. Adkins (1971), 48 Ill.2d 402, 270 N.E.2d 841, in the instant case appellant has not provided a Report of Proceedings on November 23, 1970. The

trial court's order of November 23, 1970, indicates that the court heard arguments of counsel and was "duly advised in the premises", but said nothing about evidence being heard. The law in such cases has been recently stated in Cohen v. Washington National Insurance Company (1971), 2 Ill.App.3d 149, 276 N.E.2d 6, as follows:

"A party prosecuting an appeal must furnish material essential to the disposition of the appeal. Matters dehors the record cannot be considered. In the absence of a report of proceedings or an agreed statement of facts it is presumed that the evidence supported the trial court's decision." Perez v. Vanota (1969), 107 Ill.App.2d 90, 246 N.E.2d 42.

The general rule, and the citation of many Illinois cases in point, is set out by Fins in Illinois Appellate Practice (1970), p. 146, footnote 23: "Where no report of proceedings is included in the record on appeal, the presumption is that there was sufficient evidence to sustain the decision of the trial court." One of the most frequently cited cases is that of Smith v. Smith (1962), 36 Ill.App.2d 55, 183 N.E.2d 559, which involved the construction of a trial court's temporary order of visitation. The court there stated (36 Ill.App.2d 55, 58-59):

"The defendant asserts that the court granted the motion without hearing evidence. The plaintiff asserts that both parents testified. The order made no findings of fact and said nothing about evidence being heard; however, it recited that the court was 'fully advised in the premises'. The record before us contains only the pleadings and the order. There is no report of proceedings, no agreed statement of facts, no certification of what took place at the time the order was entered.

". . . Except for the clause that the court was 'fully advised in the premises', there is nothing in the order in the present case to indicate whether a hearing was had or not. But this clause, although often routinely and loosely used, is not without significance. It has been held to connote that the court heard sufficient facts to justify its order. In re Rubenstein's Estate (Ohio App.), 68 N.E.2d 668. If a court signs an order which included the words 'the court was fully advised in the premises', we conclude, in the absence of any contrary indication in the order or in the record, that the court heard

adequate evidence, received enough information or listened to sufficient law and argument, as the necessity of the particular case required, to enable the court to reach what it believed to be the right decision on the issue presented."

Accordingly, it appears that the trial judge was able to satisfy himself that the defendant's claim of diligence and of having a meritorious defense were insufficient, that it was not reasonable to compel plaintiff to go to trial on the merits, and that substantial justice between the litigants did not require that the default judgment be vacated. People ex rel. Reid v. Adkins, (1971), 48 Ill.2d 402, 270 N.E.2d 841. Nothing in the common law record indicates otherwise.

The second issue concerns the jury demand. It is undisputed that the required jury fee was not paid at the time defendant filed his appearance. In Hunt v. Rosenbaum Grain Corp. (1934), 355 Ill. 504, 189 N.E. 907, the jury demand was timely filed but the fee was late. The opinion of the court states (355 Ill. 504, 512):

"The appearance of appellant filed March 7, 1932 made a demand for a jury trial, but the fee was not paid. The clerk, following the statute, placed the cause on the non-jury calendar. On February 23, 1933, almost a year after the date of the appearance, appellant filed a motion for an order directing the clerk to accept a jury fee of eight dollars and tendered it in open court. No reasonable excuse is shown for the failure to pay the jury fee at the time the statute provides. The court properly denied the motion."

The record here, in its present state, does not indicate a "reasonable excuse" was presented to the trial court.

Consequently, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

* DOWNING, J., did not participate.



No. 56269

ABST

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
vs.)	
)	
WILLIAM JACKSON,	)	HONORABLE
	)	KENNETH R. WENDT,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM:

On July 20, 1970, defendant William Jackson was charged with the theft of an automobile. Defendant's counsel moved to suppress physical evidence (the automobile and any testimony relating to it) and, on March 18, 1971, after an evidentiary hearing, the court sustained the motion and suppressed the evidence. The State appeals. (Supreme Court Rule 604(a)(1).) No brief has been filed by defendant.

The issue is whether the court properly sustained defendant's motion to suppress evidence.

The controlling question here is the validity of the stopping of defendant. The evidence shows that the stop was not proper under the law.

On May 4, 1970, Officer Waller received a phone call from an informer who told him that a white 1970 Riviera automobile, about which he had talked to the officer some time before and which had been stolen in East St. Louis, was at the Roberts Motel at 79th Street and Vincennes Avenue in Chicago. This informant was identified only by Officer Waller's affirmative answer to the question, "Did you have any secret, confidential, reliable, patriotic source that gave you information in the past on numerous occasions with respect to this defendant?" The informant gave the witness a vague description of the person who allegedly had the car. He stated that the man had a heavy moustache and medium brown skin. Officer Waller said he would check out the automobile. Two or two and one-half hours later he was driving westbound on 79th Street on his way to the motel at Vincennes Avenue. He had no warrant. Near LaSalle

Street (about five blocks east of the motel, he saw a 1969 white Riviera Buick eastbound on 79th Street. He made a U-turn and stopped the car on 79th Street just east of Champlain (14 blocks east of LaSalle and 19 blocks east of the motel). He stopped the car only because of the telephone call from the informant.

Under these facts, the stop was not legal. Probable cause for an arrest cannot be based upon mere suspicion. (People v. Schmidt (1972), 5 Ill.App.3d 787, 791, 284 N.E.2d 72.) An uncorroborated "tip" by an informer whose identity and reliability are both unknown does not constitute probable cause for arrest without a warrant. (People v. Parren (1962), 24 Ill.2d 572, 576, 182 N.E.2d 662.) The fact that the police acted upon previous information of an informer does not, of itself, prove that the prior information was accurate and the informer reliable. People v. McClellan (1966), 34 Ill.2d 572, 574, 218 N.E.2d 97.

The court said in People v. Pitts (1962), 26 Ill.2d 395, 186 N.E.2d 357, at page 399:

*** If this court were to validate every arrest and search without a warrant merely because the police received a tip from an unknown source, we would not dilute the constitutional guarantees, we would abolish them.

In the instant case, it was only after the officer had stopped defendant, asked him to produce identification and checked out the car that he determined it was actually a stolen car. But this does not aid the State. Since the stop was not valid, nothing that followed it could validate it.

The legality of a search is not to be determined by its results. (People v. Parren (1962), 24 Ill.2d 572, 182 N.E.2d 662; People v. Roberts (1971), 2 Ill.App.3d 927, 930, 274 N.E.2d 688.) An arrest cannot be justified by what is found during a subsequent search. People v. Beattie (1964), 31 Ill.2d 257, 260, 201 N.E.2d 396.

United States v. Ware (CA7, 1972), 457 F.2d 828, cert. den. ___ U.S. ___, cited by the State, is not in point. There, the car was found at the location specified in the information received

by the officer and the car was followed from there and the license plates checked by radio before any stop was made. No claim was made that the stop was improper. Here, the officer merely saw a car of similar color and make about five blocks from the motel, being driven by one resembling the vague description given. That alone, which was all the information he had, was not sufficient to authorize the stop made. He made no independent check of the car before stopping defendant.

In People v. Schmidt (1972), 5 Ill.App.3d 787, 284 N.E. 2d 72, the court affirmed the suppression of evidence, holding that the fact that the automobile registration card did not carry the name of either of the defendants in that case was not sufficient to create probable cause to believe that the vehicle was stolen.

The evidence was properly suppressed. The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Dempsey did not participate.

72-235

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE THOMAS J. MORAN, Justice
HONORABLE GLENN K. SEIDENFELD, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 8, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

NO. 72-235

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff - Appellee,	)	Appeal from the 15th
	)	Judicial Circuit, Ogle
-vs-	)	County
)	
TERRY G. FLANIGAN,	)	Hon. Alan W. Cargerman
	)	Judge presiding
Defendant-Appellant.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

Defendant was charged with disorderly conduct for calling the Rochelle police and falsely telling them a bomb or explosive device had been concealed where it would endanger human life. Ill. Rev. Stat. (1971) Ch. 38, Sec. 26-1(a)(4).

Upon a negotiated plea, the trial court sentenced the defendant to probation for two years, the first six months to be spent in the jail under a work release program pursuant to Ill. Rev. Stat. (1971) Ch. 75, Sec. 35 et seq.

In accepting the negotiated plea the trial court admonished the defendant of the consequences of his plea but failed to determine the factual basis for the plea. The defendant had previously plead guilty, which plea was withdrawn. At that time the defendant attempted to explain the facts to the court, viz:

"DEFENDANT: Well, I don't know how, It seems to me like you've got a different story than what I've got on it.

THE COURT: Well, what you may or may not have done doesn't really make any difference. I indicated to you what you are charged with having done, and this piece of paper which you are tendering to me is your plea of guilty admitting that you did this. If you didn't,

ASSOCIATION

then don't plead guilty. If you want to read the front of this over again, you may do so.

DEFENDANT: Read the print on this, Your Honor?

THE COURT: How far did you get in school?

DEFENDANT: 8th grade. I can read it, I mean, is that what you want me to read?

THE COURT: Read the whole thing. Take your time.

(Defendant reads the Complaint)

DEFENDANT: I wonder if I could see a lawyer, but I can't afford one myself.

THE COURT: All right, I'll permit you to withdraw your waiver of jury trial, and your plea of guilty. The waiver and plea are withdrawn. I will enter a plea of not guilty on your behalf. You stand there as you did when you walked in."

Later, at the time of the negotiated plea the following colloquy took place:

"THE COURT: Why are you pleading guilty?

DEFENDANT: Well, I guess because I made a phone call.

THE COURT: Because you are guilty, would that be correct?

DEFENDANT: Right."

Other than the charge itself the trial judge did not acquaint himself with all of the facts or the factual basis resulting in the plea.

The record discloses that the sentence herein was imposed on May 18, 1972. Supreme Court rule 402 (c), Ill. Rev. Stat. (1971) Ch. 110 A, par. 402 (c) provides:

"The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."

While we stated in People v. Rowell (1973), #72- 147, that no particular kind of inquiry as to the factual basis for a plea of guilty is required, and while we stated that the court might satisfy itself by any means to determine the factual basis, in the record before us the facts of the alleged offense do not appear except in the report of the probation officer filed on May 31st, 1972.

-3-

It appears from the brief of the defendant, not denied by the State, that as the defendant was returning from taking his wife to work, he was held up by a switching Chicago and Northwestern freight train for some fifty minutes. It further appears that this prevented him from taking medication for hypertension or mental disturbance. When he reached home in anger he called the Rochelle police department and said he was going to place a bomb under the Chicago Northwestern track, not that he had done so as alleged in the complaint. Twenty minutes later the defendant called the Rochelle police department, gave them his name, and stated that he had no intention of placing a bomb under the Chicago Northwestern tracks, but that he had been under extreme mental hypertension when he made the first phone call. As a result of these two calls to the police he was arrested and charged as indicated above, under Ill. Rev. Stat. (1971) Ch. 38, Sec. 26-1 (a) (4) as follows:

* * * "did then and there transmit by telephone to another, namely Rochelle police dispatcher C. Shook, a false alarm to the effect that a bomb or other explosive device of any nature is concealed in such a place that its' explosion would endanger human life, knowing at the time of the transmission that there is no reasonable ground for believing that such a bomb or explosive is concealed at said location."

It can thus be seen that the complaint herein charges a "fait accompli" where as a matter of fact the defendant merely made a threat to do so. The record does not disclose that any of the above was considered by the court prior to imposing sentence.

ASSOCIATION

The above perhaps is a good example of the necessity and desirability for determining the factual basis for a plea of guilty. Defendant has no criminal record, is married, has two small children, and is employed. His wife is also employed and they are buying their home. Additionally, defendant served one and one-half years in the United States Marine Corps and was honorably discharged.

This court is impressed with the fact that defendant, after threatening to place a bomb, called the police within a few minutes, gave them his name and advised them that he was not going to carry out his threat.

While the defendant plead guilty under a negotiated plea, such a plea must admit the guilt of the accused to the offense charged. Here, the defendant was charged with having falsely stated that a bomb had been placed on Chicago Northwestern property while the facts disclose that he merely threatened to place such a bomb and retracted the threat twenty minutes later.

A plea of guilty to a charge which is not substantiated by the facts is nugatory and cannot be the basis for the imposition of a sentence.

Therefore under the facts herein the judgment of conviction is reversed.

REVERSED.

THOMAS J. MORAN, J., and SEIDENFELD, J., concur.



12 I.A.³ 355

57086

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	ABST
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
HERRON LOVE,	)	JACQUES F. HEILINGOETTER
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE EGAN delivered the opinion of the court:

This is an appeal from an order dismissing a petition for post-conviction relief without an evidentiary hearing. The defendant, Herron Love, was found guilty of murder in a bench trial and sentenced to a term of fourteen to twenty years. The direct appeal of his murder conviction was affirmed by this court. People v. Love, 108 Ill.App.2d 97, 247 N.E.2d 40.

The only point now raised by the defendant is whether he knowingly waived his right to a jury trial. This question was not argued by the defendant in his direct appeal to this court, and the State argues that his failure to do so results in a waiver of that issue.

In People v. Walker, 6 Ill.App.3d 909, 914, 286 N.E.2d 812, the same issue was presented and decided adversely to the defendant's position. See also People v. Doherty, 36 Ill.2d 286, 222 N.E.2d 501.

Assuming that the question could still be raised, we conclude that the record establishes that the defendant did knowingly waive a jury trial. His lawyer told the court that it would be a bench trial; the defendant said he did not understand "bench trial"; the case was passed to give the lawyer an opportunity to discuss the matter with the defendant. When the case was called again, the defendant in response to

his lawyer's questions said that in his discussions with his lawyer he had been advised of his rights; in response to questions by the court and his lawyer he said he wished to be tried by the court and to waive a jury.

Factually, this case is similar to People v. Hill, 102 Ill.App. 2d 77, 243 N.E.2d 491. There, the court held, as we do here, that the defendant knowingly and intentionally waived his right to a jury trial.

Since we conclude that no error of law appears and that an opinion would have no precedential value, this opinion is filed and the case disposed of pursuant to Illinois Supreme Court Rule 23, adopted effective January 31, 1972. Ill.Rev.Stat. 1971, ch. 110A, 1972 supp. par. 23.

The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

PUBLISH ABSTRACT ONLY.

12 I.A.³ 475

12 I.A.³ 429

72-157

UNITED STATES OF AMERICA

ABST

12 I.A.³ 428

(24540- 4M- 9-70) 160-0

STATE OF ILLINOIS

ABST

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD E. TRAPP, Judge

HONORABLE LELAUD SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day
of July A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

12 I.A.³ 475

12 I.A.³ 429

72-157

UNITED STATES OF AMERICA

ABST

General No. 11950

Agenda No. 73-150

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee)	
)	
vs	)	Appeal from
	)	Circuit Court
EDMUND PAPPANI,	)	Champaign County
)	
Defendant-Appellant)	

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

This is an appeal from the Circuit Court of Champaign County. Defendant-appellant, Edmund Pappani, was convicted, during bench trial, of theft under \$150. A fine of \$50 was imposed.

Defendant urges that there is insufficient "admissible and credible" evidence to sustain the conviction. The witness Brinneman testified that on the evening of the incident she had between \$30 and \$40 in her purse in bills. During the evening defendant, a stranger, asked, and was permitted to sit at a table in the lounge at the Ramada Inn, with Brinneman

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12 I.A.³ 429

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UNITED STATES OF AMERICA

ABST

and two companions. Brinneman left her purse at the table. At one point in time the defendant was the only person seated at the table. Two witnesses testified to seeing defendant put his hand in the purse, and one testified that he took something from the purse, looked at it and put it in his pocket. One of these witnesses, a waitress in the lounge then warned Brinneman to check her purse which she did and discovered the money was missing. The police were called, defendant arrested. He had a total of \$227.50 in money on his person. He had \$35 in his right pants pocket in bills, all other bills were in his billfold. Defendant offered no testimony. He was arrested in the lounge very shortly after Brinneman discovered that money had been taken from her purse.

Defendant also assigns as error the admission into evidence of the \$35 found in defendant's right pants pocket. Brinneman, of course, did not have the serial numbers of the bills taken from her purse. Under *People v Smith* 63 Ill.App.2d 369, ___ N.E.2d ___, and *People v Hall* 1 Ill. App.3rd 792, 275 N.E.2d 453, the currency found in defendant's possession was properly received in evidence.

The evidence here is not so unsatisfactory as to leave a reasonable doubt of defendant's guilt, on the contrary it is

12 I.A.³ 475

12 I.A.³ 429

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UNITED STATES OF AMERICA

ABST

clear, persuasive and uncontradicted. A detailed recital of all the testimony would have no precedential value and we therefore, pursuant to Supreme Court Rule 23, affirm the judgment of the trial court.

Judgment affirmed.

Craven, P.J., and Trapp, J. concur.

12 I.A.³ 475

12 I.A.³ 429

72-157

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE THOMAS J. MORAN, Justice
HONORABLE CARL SWANSON, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 12, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

NO. 72-157

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	the 17th Judicial
	)	Circuit, Winnebago
LARRY LARKIN,	)	County, Illinois.
)	
Defendant-Appellant.)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant pled guilty to armed robbery and was sentenced to serve six to fifteen years in the penitentiary.

Defendant, and his companion, committed an armed robbery against two victims, husband and wife, ages 60 and 50 years respectively. In commission of the crime, the victims (particularly the wife) were severely beaten. The defendant entered plea negotiations with the State and their agreement was accepted by the court. Prior to acceptance of the plea, the court fully and completely admonished the defendant in accordance with the law.

While this appeal was pending, defense counsel filed a motion to withdraw, asserting the record to be free from error and the appeal, without merit. A study of the record substantiates this contention.

After the motion to withdraw, defense counsel filed a motion for summary modification of sentence claiming the minimum

sentence imposed was greater than allowed under the Unified Code of Corrections.

Armed robbery is a class 1 felony, Ill. Rev. Stat. 1972 Supp., ch. 38, sec. 18-2 (b), for which the minimum term shall be four years unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term. Ill. Rev. Stat. 1972 Supp. ch. 38, sec. 1005-8-1 (c) (2).

Without supportive argument, defense counsel states that the sentence should be reduced to a term of four to twelve years because of the provisions of the Unified Code of Corrections. We can only assume that he relies upon Sections 1005-8-1 (c)(3) and (4), wherein it is stated that the minimum term shall not be greater than one-third of the maximum term. These provisions, however, apply to class 2 and class 3 felonies, and are inappropriate to the instant offense. While noting that the Code was not in effect at the time, we nevertheless find that under the circumstances of this case, the trial court properly sentenced defendant in accordance with the provisions of Section 1005-8-1 (c) (2).

Defendant was served a copy of the motion to withdraw, and allowed thirty days by this Court in which to raise any points; he did not respond. In accordance with Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), we, after fully examining the record, conclude that this appeal is wholly frivolous.

Motion for summary modification of sentence - Denied
 Motion to withdraw - Allowed
 Judgment of conviction and sentence - Affirmed.

GUILD, P.J. and SWANSON, J. J. - Concur



No. 57026

In the matter of the estate of
HARRY L. KENT, deceased,

JOHN E. GOLDEN, Administrator
of the Estate of HARRY L. KENT,
deceased,

Petitioner-Appellee,

vs.

DONALD ROSENBERG, Father and next
friend of GREGORY ROSENBERG, a
minor,

Respondent-Appellant.

ABST.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
ANTHONY J. KOGUT,
PRESIDING.

PER CURIAM:

This is an appeal by respondent, Donald Rosenberg, father and next friend of Gregory Rosenberg, a minor, from an order of the probate division of the circuit court of Cook County which vacated the issuance of letters of administration and closed an estate which was opened on behalf of the respondent for the sole purpose of maintaining a personal injury action against the Estate of Harry L. Kent, deceased.

On July 8, 1970, Donald Rosenberg, father and next friend of Gregory Rosenberg, a minor, filed a personal injury action against John E. Golden, administrator of the Estate of Harry L. Kent, deceased, in the circuit court of Cook County, Illinois, in which it was alleged that the plaintiff, Gregory Rosenberg, then thirteen years of age, was born on May 17, 1956; and that on June 26, 1970, John E. Golden was appointed administrator of the Estate of Harry L. Kent, deceased, by an order entered in the probate division of the circuit court of Cook County. The complaint further alleged that on or about March 23, 1956, the plaintiff's mother, Marline Rosenberg, was a passenger in an automobile driven by Mildred Robbins in a southerly direction on Michigan Avenue at or near 36th Place, in the City of Chicago; that Harry L. Kent was the owner and operator of another vehicle also being operated in a southerly direction on Michigan Avenue at or near 36th Place in the City of Chicago;

that Kent's vehicle collided with the rear of the vehicle in which Marline Rosenberg, the mother of the plaintiff, was riding as a passenger; that at said time and place said Marline Rosenberg, who was in her seventh month of pregnancy and carrying the plaintiff, was in the exercise of all due care and caution for her own safety and the safety of her unborn child; that as a direct result of the negligence of Kent the plaintiff's mother, Marline Rosenberg, suffered a rupture of the amniotic sac and that this condition was the direct and proximate result of a birth defect, causing the plaintiff, Gregory Rosenberg, to have a severe visual defect; and that by reason thereof the plaintiff prays judgment against the Estate of Harry L. Kent, deceased, in the sum of \$1,000,000.

On June 16, 1970, a petition for letters of administration was filed in the probate division in the Estate of Harry L. Kent who, according to the petition, died on July 18, 1956, at Chicago, Illinois, leaving no will. Letters of administration were issued to John E. Golden, as administrator of the Estate of Harry L. Kent, on June 26, 1970.

On June 9, 1971, a petition was filed to vacate the order issuing letters of administration to John Golden, administrator of the Estate of Harry L. Kent, deceased, and also to strike the opening of said estate from the docket of the court and to deny the petition for letters of administration nunc pro tunc as of June 26, 1970.

On November 23, 1971, an order was entered in the probate division of the circuit court in which the court found that the accident took place on or about March 23, 1956; and that the order issuing letters of administration and appointing the administrator was signed on June 26, 1970, approximately fourteen years and three months after the accident. It was ordered that the claim of Donald Rosenberg, father and next friend of Gregory Rosenberg, a minor, be barred pursuant to Chapter 3, Section 204, of the Illinois Revised Statutes; that the estate be closed; and that the administrator be released and discharged on his bond.

The issue on appeal is whether the 1967 Amendment to Section 204 of the Probate Act (Ill.Rev.Stat. 1971, ch.3, par. 204), barring claims unless letters of administration are issued in the estate of the decedent within seven years from the date of death, acts as a bar to the filing of a claim for personal injury against the estate or does Section 21 of the Limitations Act (Ill.Rev.Stat. 1971, ch.83, par.22) govern the time in which a claim for personal injuries may be filed by a minor.

The respondent did not discuss the 1967 Amendment. He limits his discussion to the provisions of Section 204 prior to the amendment. He contends that the trial court erred in vacating the issuance of letters of administration and in closing the estate, which was opened by the respondent for the sole purpose of maintaining a personal injury action. He also contends that under the general Statute of Limitations (Ill.Rev.Stat. 1971, ch.83, pars. 15-22) a minor may maintain a cause of action for personal injury at any time within two years after reaching his majority, which, in the case at bar, would be May 17, 1979; and that, therefore, the trial court prematurely closed the estate. He relies upon the case of Schloegl v. Nardi (1968), 92 Ill.App.2d 302, 234 N.E.2d 558, where the court held that an estate which was duly administered and closed could be reopened and the executors reappointed so that a cause of action not barred by the two-year statute of limitations could be asserted against the estate for personal injuries sustained in an automobile accident which had occurred during the deceased motorist's lifetime; and that the provisions of Section 204 of the Probate Act did not bar the institution of a court action against the estate after the expiration of the seven month period from the date of issuance of letters testamentary for the filing of claims. However, the court there held (92 Ill.App.2d, p.306) that the plaintiffs would be limited, by Section 204 in the collection of any judgment which may be obtained, to the property of the deceased, which had not been inventoried and distributed. To the same effect is the case of In Re Estate of Palmer (1963), 41 Ill.

App.2d 234, 190 N.E. 2d 500.

However, that portion of Section 204 of the Probate Act (Ill.Rev.Stat. 1971, ch.3, par.204), which requires all claims to be filed within seven months from the issuance of letters of administration, is not in issue in the case at bar. Here the proceedings in the probate division had not progressed to the filing of the inventory or the closing of the estate when the trial court entered the order vacating the issuance of letters of administration and the closing of the estate. Here, only letters of administration had issued when the petition was filed on June 9, 1971.

The petitioner argues that the trial court properly vacated the issuance of letters of administration and properly ordered the estate closed because no letters of administration had been issued within seven years of the death of the decedent, which was July 18, 1956.

Section 204 was amended by an Act, approved July 26, 1967, and effective January 1, 1968, which amendment provided as follows:

All claims barrable under the provisions of the preceding paragraph shall in any event be barred unless letters testamentary or of administration are issued under the estate of a decedent within seven years of his death.

Petitioner rightfully states that there are no exceptions provided for in said amendment for one under a legal disability. He argues that since Harry L. Kent died on July 18, 1956, and letters of administration did not issue until June 26, 1970, more than thirteen years after the death of the decedent, the claim of the respondent, a minor, is now barred.

The petitioner relies on the case of Lowrey v. Malkowski (1960), 20 Ill.2d 280, 170 N.E.2d 147, cert. den. 365 U.S. 879, and Thompson v. Capasso (1959), 21 Ill.App.2d 1, 157 N.E.2d 75, which held that the one year limitation period provided for in the Dram Shop Act (Ill.Rev.Stat. 1971, ch.43, par.135) applied retroactively to minors. The petitioner contends that, likewise, the seven year limitation period now contained in Section 204 should retroactively apply to the minor in the case at bar. However, in Super Valu Stores

v. Stompanato (1970), 128 Ill.App.2d 243, 261 N.E.2d 830, Leave to Appeal Denied, 44 Ill.2d 587, the court stated (128 Ill.App.2d, 248-249):

As is well known, the time element contained in the Dram Shop Act, being a statute creating a right that did not exist at common law, is not a mere statute of limitation but an integral part of the right itself. "Thus in unmistakable language, the legislature has said that any person having a right of action against a Dramshop keeper cannot bring suit thereon after the expiration of the one-year limitation." Shelton v. Woolsey, 20 Ill.App.2d 401, 403, 156 N.E.2d 241; Lowrey v. Malkowski, 20 Ill.2d 280, 284, 170 N.E.2d 147.

It would therefore appear that the one year limitation provision in the Dram Shop Act, and its retroactive application to minors, is limited to that particular Act and is not of general application.

In Haymes v. Catholic Bishop of Chicago (1965), 33 Ill.2d 425, 211 N.E.2d 690, the court refused to follow the Lowrey decision and refused to bar recovery in a suit by a minor where he failed to comply with the provisions of Sections 2 and 3 of the School Tort Liability Act (Ill.Rev.Stat. 1971, ch.122, par.822, 823).

In the recent case of Stanley v. Denning (1970), 130 Ill.App.2d 628, 264 N.E.2d 521, the issue was whether the six months notice provision and the one year limitation provision of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev. Stat. 1971, ch.85, pars.8-101, 8-102 and 8-103) should be applied retroactively. The Act provided that failure to serve notice within the six month period and failure to file suit within one year "shall bar the injured from further suing." The plaintiff argued that his cause of action was governed by the general Limitation Act (Ill.Rev. Stat. 1971, ch.83, par.15), which allowed a suit to be brought within two years, without the necessity of filing a six month notice. The defendant contended that Sections 8-101 through 8-103 of the Tort Immunity Act were to be considered as statutes of limitation and, therefore, should be applied retroactively. The court stated (130 Ill.App.2d, pp. 630-631) that "as a general rule, statutes are to be construed prospectively unless the legislative intent that they

be given retroactive operation clearly appears from the express language of the act or by necessity or unavoidable implication"; that "retrospective legislation is not favored"; that a presumption exists "that a statute is to operate prospectively and not retro-spectively"; and that "where the act requires a retroactive appli-cation it is the duty of the court to so apply it." The court, in refusing to apply the provisions of the Tort Immunity Act retro-actively, said (130 Ill.App.2d 632-633):

We have no doubt that a statute shortening the limitation period fixed by previous existing statutes may be applied retroactively even to existing common law causes of action, subject to the qualification that there must be a rea-sonable time permitted to enforce an existing cause of action. Although it could be concluded here that plaintiff had a reasonable time to en-force his cause of action subsequent to the Tort Immunity Act, a retroactive construction would also include cases in which a reasonable time would not have existed. Since no effective date is included in the Act, it is reasonable to assume that the legislation is not intended to be retro-active. Tatge v. Hyde, 84 Ill.App.2d 310, *supra* at page 317; Schear v. City of Highland Park, 104 Ill.App.2d 285, *supra*, at page 290.

Absent a clearly expressed intention to apply Tort Immunity Act to pre-existing cause of action, we hold the legislation to be prospective. This application is also preferred since it does not defeat the substantial purpose of the legislation, while protecting rights which ought to be an appropriate subject of protection. Hogan v. Bleeker (1963), 29 Ill.2d 181, 189.

In the case at bar the 1967 Amendment to Section 204, which bars all claims unless letters of administration are issued in the estate of a decedent within seven years of his death, contains no effective date and, therefore, it is reasonable to assume that the legislation was not intended to be retroactive. Absent a clearly expressed intention to apply the 1967 Amendment to Section 204 to a pre-existing cause of action, the legislation should be held to be prospective. Such an interpretation does not defeat the substan-tial purpose of the legislation and protects the rights of the minor, whose rights are an appropriate subject of protection (Ill.Rev.Stat. 1971, ch.83, par.22). Stanley v. Denning (1970), 130 Ill.App.2d 628, 633, 264 N.E.2d 521.

In the case at bar the accident, from which the minor was allegedly injured, occurred on March 23, 1956. Harry L. Kent, who allegedly caused the injury, died on July 18, 1956. The Estate of Harry L. Kent, deceased, was opened and letters of administration issued on June 26, 1970. The personal injury suit by the plaintiff and against the Estate of Harry L. Kent, deceased, was filed on July 8, 1970. The opening of the estate and the filing of the personal injury suit was over thirteen years after the cause of action accrued and the alleged defendant had passed away. However, the Statute of Limitations had not run at the time the suit was instituted because the plaintiff was a minor, then being thirteen years of age. Under Section 21 of the Limitations Act (Ill.Rev.Stat. 1971, ch.83, par.22) a male minor may bring a personal injury action any time within two years after he has reached the age of 21 years.

At the time Kent died in 1956 the seven year bar to claims was not in existence and did not come into existence until eleven years after the death of Kent. It is the position of the petitioner that the 1967 Amendment to Section 204 should apply retroactively. Under such reasoning the claim of the minor would legally have been barred in 1963, some four years prior to the passage of the 1967 Amendment. Such a conclusion would be contrary to the established concept of justice and would defeat the rights of the respondent, a minor. If the 1967 Amendment to Section 204 were to be construed to apply retroactively it would be in direct conflict with Section 21 of the Limitations Act, which preserves the cause of action of a male minor until two years after he becomes 21 years of age. Such an interpretation would nullify a substantial right which the respondent, as a minor, has under Section 21, a right "which ought to be an appropriate subject of protection." Stanley v. Denning (1970), 130 Ill.App.2d 628, 264 N.E.2d 521.

It is apparent that the 1967 Amendment to Section 204 of the Probate Act should not be applied retroactively to the facts in the case at bar.

The judgment of the trial court is reversed and the cause

is remanded with directions for the trial court to reopen the Estate of Harry L. Kent, deceased, reissue the letters of administration to John E. Golden, and to proceed with the administration of the estate in a manner not inconsistent with the views expressed herein.

Judgment reversed;
cause remanded with directions.

Third Division. Mr. Justice Schwartz did not participate.

121.A³ 488
CHICAGO
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ASSOCIATION

57459

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
vs.) CIRCUIT COURT, ABST
LEON SMITH,) COOK COUNTY.
Defendant-Appellant.) HON. KENNETH R. WENDT,
Presiding.

* PER CURIAM, (First Division, First District):

Leon Smith was charged with the sale and the possession of a narcotic drug in violation of Section 22-3 of the Criminal Code of Illinois. (Ill.Rev.Stat. 1969, ch. 38, par. 22-3.) After a bench trial he was found guilty of the sale of a narcotic drug and sentenced to not less than one year nor more than three years in the penitentiary.

On appeal defendant argues that the conviction was based solely on the testimony of Alonzo Langford, a narcotics addict who was also a police informer, and, therefore, his testimony is completely untrustworthy. The fact that a witness is a narcotics addict has a bearing upon his credibility; however, it does not follow that his testimony must be disbelieved, especially when corroborated by other witnesses. (People v. Smith, 41 Ill.2d 158, 161, 242 N.E.2d 198.) While it is true that habitual users of opium or other narcotics often become notorious liars and that a chronic morphine-maniac is often a confirmed liar, the fact that a witness is a narcotics addict bears only upon his credibility. People v. Hudson, 106 Ill.App.2d 130, 136, 245 N.E.2d 613; People v. Littlejohn, 130 Ill.App.2d 1064, 1067, 266 N.E.2d 358 (certiorari denied, 404 U.S. 965).

In the case at bar the circumstances surrounding the arrest of the defendant and the testimony of Police Officer Gary corroborates Langford's account of the events of February 15, 1971. Langford was thoroughly searched before he made the purchase from the defendant.

No narcotics were found on his person. Furthermore, Langford and Police Officer Gary testified that Langford did not enter the defendant's house but conducted the entire transaction on the street in constant view of Police Officer Gary.

After Langford made the purchase from the defendant he walked directly across the street and handed the packet he had received to Police Officer Gary. Although no field test was conducted as to the contents of the packet, which contained a white powder, the defense stipulated that subsequent police laboratory tests demonstrated that the substance in the packet was heroin.

When the defendant was arrested hypodermic needles were found in his room. The police also found in the possession of the defendant three dollars in prerecorded bills which Police Officer Gary had given to Langford. This is strong evidence that the defendant sold a narcotic drug to Langford. People v. Littlejohn, 130 Ill. App.2d 1064, 1068, 266 N.E.2d 358 (certiorari denied, 404 U.S. 965).

The defendant relies upon the case of People v. Crump, 5 Ill. 2d 251, 260, 125 N.E.2d 615, where the court held that it is proper to cross-examine a drug addict to bring out his unlawful and disreputable occupation and activity as a matter of affecting his credibility. It does not follow, however, that Langford's testimony must necessarily be disbelieved especially when it was corroborated by Police Officer Gary and, therefore, the credibility of Langford's testimony was a matter for determination by the trial court. (People v. Hamby, 6 Ill.2d 559, 562, 129 N.E.2d 746.) The defendant cited the Hamby case in support of his statement that the fact that a witness is a narcotics addict has an important bearing upon his credibility and warrants close scrutiny of his testimony.

The defendant's argument is based upon his contentions that the conviction rests solely on the testimony of the narcotics addict

informer and that the lack of the testimony that the alleged white powder, not being field tested, was heroin as charged in the indictment. These contentions are unfounded because the record shows that the testimony of Langford, the drug addict, was corroborated by the testimony of Police Officer Gary. Although no field test was conducted as to the contents of the package, the defendant stipulated that a subsequent police laboratory test demonstrated that the substance in the packet was heroin. A similar stipulation was accepted in People v. Hudson, 106 Ill.App.2d 130, 134, 245 N.E.2d 613.

The trial court saw Langford, the informer and narcotics addict, heard his testimony and found it credible. This court will not substitute its judgment on the matter of credibility of witnesses and the weight to be given their testimony where the trial court saw them and heard their testimony, unless the court can say that the proof was so unsatisfactory as to justify a reasonable doubt as to the defendant's guilt. (People v. Hudson, 106 Ill.App.2d 130, 137, 245 N.E.2d 613; People v. Smith, 41 Ill.2d 158, 161, 242 N.E.2d 198.) In the case at bar the testimony of Langford was corroborated by the testimony of Police Officer Gary and other surrounding circumstances. The record supports the finding that the defendant was guilty beyond a reasonable doubt.

The defendant also argues that the trial court erred in not considering the defendant's alibi, since it was credible and unshaken on cross-examination.

Calling attention to the testimony of Mrs. Gertrude Green, the defendant's aunt, and Mr. Flowers to the effect that the defendant did not leave the house in the morning of February 15, 1971, and, therefore, could not have sold the heroin to Langford on the street, the defendant maintains that the alibi testimony remained uncontested and unimpeached. This is not an accurate statement. The testimony

of Langford and Police Officer Gary that defendant was on the street in front of 5040 Washington Park Court in the morning of February 15, 1971, and did there sell to Langford a packet, later proved to contain heroin, is also positive and unimpeached. There was, therefore, a conflict in the evidence. In a bench trial it is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed.

People v. Bracey, 129 Ill.App.2d 57, 62, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378.

While it is true that the alibi evidence may not be disregarded, there is no obligation on the trial court to believe the alibi testimony where there is positive testimony to the contrary. People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462; People v. Robinson, 3 Ill. App.3d 843, 850, 279 N.E.2d 526; People v. Bracey, 129 Ill.App.2d 57, 62, 262 N.E.2d 748.

In the case at bar the trial court believed the testimony of Langford and Police Officer Gary over and above the testimony of the defendant that he was in the house the entire morning of February 15, 1971, even though the defendant's alibi was supported by Mrs. Gertrude Green, his aunt, and George Flowers, who also testified that the defendant did not leave the house during the morning of February 15, 1971.

The trial court was in a better position to observe the demeanor of the witnesses during the trial and to consider their interest in the result.

Finally, the defendant argues that certain remarks by the trial court indicate that the court had a reasonable doubt as to the guilt of the defendant. The remarks to which the defendant refers occurred after the closing arguments, where in response to the defendant's

statement that he "loved his mother" and that he was "framed" the trial judge stated that he was not present at the scene of the crime and that only God and those who were there could know the truth with absolute certainty. However, the trial court then said that the State proved its case beyond a reasonable doubt.

The defendant cites the cases of People v. Kidd, 410 Ill.2d 1, 102 N.E.2d 141; People v. Magadan, 126 Ill.App.2d 335, 261 N.E.2d 703 and People v. Olson, 3 Ill.App.3d 240, 278 N.E.2d 861, in each of which the court held that under the facts and circumstances appearing in the respective records the defendant was not found guilty beyond a reasonable doubt. The foregoing cases are not applicable to the facts in the case at bar because here the evidence clearly establishes that on February 15, 1971, the defendant sold a narcotic drug to Alonzo Langford.

There is no reversible error. The judgment is affirmed.

JUDGMENT AFFIRMED.

*Per Curiam
Justice Goldberg took no part.

121.A³ 489



57785)
57786)

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
In the Interest of JEFFERY MAYFIELD,)	
JOHN T. BURNS, minors,	)	Hon. William F. Fitzpatrick,
	)	Presiding.
Defendants-Appellants.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

After a bench trial in the Juvenile Division of the circuit court of Cook County, Jeffery Mayfield and John T. Burns, hereinafter called defendants, were adjudicated delinquent for committing the offense of aggravated battery. (Ill.Rev. Stat. 1971, ch.37, par.702-2, and ch.38, par.12-4.) Defendants' sole contention on appeal is that they were not proven guilty beyond a reasonable doubt.

The testimony as adduced at the adjudicatory hearing established that on March 26, 1972, at approximately 3:00 p. m., defendant Mayfield broke into the Curry apartment located at 6631 S. Lowe, Chicago, Illinois. When confronted by Mrs. Curry, defendant Mayfield said he would be back and blow up the parlor. Between 7:00 and 8:00 p. m. that evening, several shotgun blasts were fired through the front window of the Curry home, injuring Eva May Curry and Edward Curry.

Leonard Curry testified that on the evening in question, he opened the front door of the home and saw three young men standing in a gangway across the street. The men had shotguns and were aiming at his house. He immediately "hollered" for

his family to watch out and then "ducked." The men then started shooting. He identified two of the young men as the defendants Mayfield and Burns whom he had observed around his home earlier that day. There were street lights on both sides of the street and he was approximately 50 feet away at the time he observed the defendants.

Michael Thomas testified that on the evening in question, he was walking to a friend's home across the street from the Curry home. He observed defendants Mayfield and Burns standing in front of the Curry home. Jeffery Mayfield had a shotgun and fired into the Curry home several times. Mr. Thomas was approximately 10 feet away from the defendants when he observed them. The defendants were standing directly under a street light in front of the Curry home. Mr. Thomas had seen both defendants in the neighborhood prior to the incident in question.

Both defendants testified that they were elsewhere at the time of the shooting and both denied firing a shotgun at the Curry home.

There was sufficient evidence from which the trial judge could reasonably have concluded that the defendants were proven guilty beyond a reasonable doubt. (People v. Cato, 4 Ill.App. 3d 1093, 283 N.E.2d 259.) No error of law is raised and none appears in the record. A full opinion by this court would have no precedential value.

57785)
57786)

The judgment of the circuit court of Cook County is affirmed in accordance with Rule 23 of the Supreme Court of Illinois. Ill.Rev.Stat. 1971, ch.110A, par.23.

Judgment Affirmed.

*Mr. Justice Egan did not participate.

57476

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
RAYMOND WILLIAMS, otherwise called	)	Hon. Louis B. Garippo,
CURTIS SMITH,	)	Presiding.
)	
Defendant-Appellant.)	

PER CURIAM:

The defendant, Raymond Williams, otherwise called Curtis Smith, was charged with the offense of attempted rape and aggravated battery in violation of Section 8-4 and Section 12-4(b-1) of the Criminal Code (Ill.Rev.Stat. 1969, ch.38, pars.8-4, 12-4). After a bench trial the defendant was found guilty of the offense of attempted rape and sentenced to a term of imprisonment in the Illinois State Penitentiary of not less than 8 years nor more than 14 years.

On appeal, the defendant contends that he was not proven guilty beyond a reasonable doubt. This requires a review of the evidence.

Mrs. Sandra Blankinship testified that on April 7, 1971 at approximately 7:00 a.m. she entered the lobby of her apartment building at 7309 S. Bennett, Chicago, and as she attempted to unlock the door which leads to her apartment the defendant entered the lobby. She did not recognize him as one of the tenants of the building. The defendant came toward her and shoved her up against the wall thereby causing her keys to fall. She screamed and scratched the defendant on the nose in an effort to ward off his attack. Defendant said, "If you scream again I will kill you, bitch."

The defendant pulled a knife, approximately five inches long, which he pressed against her neck. He then began to kiss her on the lips while he fondled her vaginal area and inserted one of his fingers inside her vagina. During this time the knife was held against her back. Mrs. Blankinship told the defendant that she lived alone and to come up to her apartment. The defendant agreed and allowed her to open the door which led

to her apartment. Before going up to her apartment the defendant told her, "If you try anything, I am going to kill you." Mrs. Blankinship and the defendant then walked upstairs. She opened the door to her apartment and when inside tried to close it. The defendant was outside the door, trying to get in. She screamed for her husband, who came to her aid. Mrs. Blankinship then telephoned the police and gave them a description of the man. She later identified the defendant in a police lineup.

Police Officer Gregory Mustari testified that he received a call of a rape in progress; including a description of the offender. A second call informed him that the offender was fleeing the scene on foot going north on Bennett. Police Officer Mustari observed the defendant running. He was bleeding from the left side of the nose, his zipper was open, his penis was exposed and he was carrying a knife. When Police Officer Mustari approached the defendant he threw the knife to the ground and ran up the steps of a house. Mustari picked up the knife, which was introduced in evidence as People's Exhibit 1. Mustari pursued the defendant up the steps where he subdued him and put on handcuffs. The defendant said to Mustari, "What are you making a big deal for? All I did was push the woman." Mustari then arrested the defendant and took him to the police station.

Mr. L. Z. Blankinship, Jr., testified that he was in the bathroom when he heard his wife scream for help. He ran to the front door and felt someone pushing against it from the outside. However, he could not identify this person because he could only observe part of the individual's body.

The defendant testified that he was a salesman for Best Products; that in an effort to gain access to the building at 7309 S. Bennett, he hurriedly opened the door, bumping into Mrs. Blankinship. As a result, she became frightened, screamed and scratched him on the nose. When the defendant inquired as to the reason for her scratching him, she replied, "Oh baby, I am sorry"; that she then threw her arms around the defendant and began kissing him and invited him up to her apartment.

Defendant stated that he refused her request at first, but later gave way to her persuasion.

Defendant further testified that after the door was slammed in his face, he ran outside and started running. He ran up the steps to a house when Police Officer Mustari grabbed him and placed handcuffs on him. The defendant stated Mustari then zipped his fly down and turned him towards a crowd and stated, "Look at this son-of-a-bitch. He is wanted for rape. His fly is open." Defendant denied having a knife.

The defendant argues that the State presented no testimony of either acts or words of the defendant indicating either his intention or attempt to commit rape upon the complaining witness. He relies upon People v. Richardson, 18 Ill.2d 329, 333, 164 N.E.2d 61, where the court held that the crime of assault with intent to commit rape requires proof beyond a reasonable doubt of an unlawful assault upon the prosecuting witness with intent, feloniously and forcibly, to ravish and carnally know her against her will. The defendant contends the State failed to prove by objective evidence that the defendant had, not only lascivious intent, but intent to "pleasure himself" by force, and over the vicious objection of the prosecuting witness and that having such an intent he proceeded toward gratification, except for the intervention of force or forces other than his own will.

The law is clear that to commit the offense of attempt rape, the offender must have had the intent to have carnal knowledge of the victim and the purpose of carrying out this intent by means of force against her will, and must take a substantial step toward accomplishing his purpose. People v. Moore, 77 Ill.App.2d 62, 65, 222 N.E.2d 142; People v. Young, 6 Ill.App.3d 119, 122, 285 N.E.2d 159. However, intent need not be expressed but may be inferred from the surrounding circumstances. People v. Trinlett, 46 Ill.2d 109, 112, 263 N.E.2d 24 (cert. denied 401 U.S. 955). Attempt to commit rape may be inferred from the conduct of the defendant, the character of the assault, the words spoken, the acts done and the time and place of the occurrence. People v. Bazzelle, 130 Ill.

App.2d 131, 138, 264 N.E.2d 457 (cert. denied 404 U.S. 836); People v. Hornbuckle, 7 Ill.App.3d 328, 331, 287 N.E.2d 294.

In the case at bar, the defendant's intent to rape Mrs. Blankinship may be inferred from his conduct in pushing the victim up against the wall and placing a knife against her neck, in kissing her, in fondling her vaginal area, in inserting his finger into her vagina; and in the statements by the defendant that "If you scream again, I will kill you, bitch" and "if you try anything, I am going to kill you."

The testimony of Mrs. Blankinship was clear and convincing. It was supported by her husband's testimony that he came to her aid and assisted in preventing her attacker from entering the apartment; and by Police Officer Mustari's testimony, relating to the arrest of the defendant, wherein he observed the defendant running; that he was bleeding from the left side of the nose; that his zipper was open and his penis was exposed; and that the defendant was carrying a knife.

In a bench trial it is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. People v. Bracey, 129 Ill.App.2d 57, 62, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378.

In the case at bar the trial court believed the testimony of the witnesses for the State over and above the testimony of the defendant. The trial court was in a better position to observe the demeanor of the witnesses during the trial. The facts prove the defendant guilty of attempted rape beyond a reasonable doubt. Under such circumstances this court should not disturb the findings of the trial court.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

Third Division. Justice Schwartz did not participate.



ABST

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)
) COURT OF COOK COUNTY.
vs.)
) HONORABLE
CHARLES HOY,) IRVING LANDESMAN,
) PRESIDING.
Defendant-Appellant.)

PER CURIAM:

Charles Hoy, hereafter called defendant, was charged by indictment with the crime of theft in violation of Section 16-1 (a)(1) of the Criminal Code. Ill.Rev.Stat. 1967, ch.38,par.16-1(a)(1). After a bench trial, he was found guilty and sentenced to a term of one year to one year and one day in the Illinois State Penitentiary. On appeal, defendant argues that he was not proven guilty of theft beyond a reasonable doubt.

At trial, the following evidence was adduced: Immanuel Burr testified that in January, 1968, he owned a dark blue, 1963, Pontiac Grand Prix with chrome wheels and a white interior. The value of the car was \$1,000. On January 5, 1968, the car was stolen from 1815 West Roosevelt Road, Chicago, Illinois. He recovered his car on January 7, 1968, from the Chicago Police Auto Pound. The ignition had been torn out of his automobile.

Ronald Hall, a Chicago Police Officer, testified that on January 7, 1968, he was on duty in a marked squad car with his partner, Officer Charles Collins. At approximately 2:15 a.m. he was proceeding without headlights through the alley at 143 North Homan, Chicago, Illinois. There he observed a 1963 Pontiac which was jacked up on the left side with the figure of a man at the left rear side of the automobile. As he came closer, Officer Hall observed a figure jacking up the automobile. When Officer Hall got within 10 to 15 feet, the man looked up, saw the squad car and fled. Officer Hall was able to see the man's face at this time. He identified the man as the defendant, Charles Hoy. The defendant ran 10 to 20 feet down the alley until he reached an abandoned automobile. The defendant then crawled underneath the automobile. Officer Hall and his partner then placed the

defendant under arrest. A closer examination of the 1963 Pontiac revealed that there was a jack with a tire iron attached to the left rear side of the car and two four-way tools lying on the ground. There were also three lug nuts which had been taken off the jacked up tire. The ignition had been torn out and the wires were hanging loose. It had recently snowed and other vehicles in the area were covered by the snow, but the 1963 Pontiac was not covered with snow. There were lights in the alley approximately 20 to 25 feet from the 1963 Pontiac.

Charles Collins, a Chicago Police Officer, testified in substantial accord with the testimony of his partner, Officer Hill.

Ronald Scagges testified for the defendant that on January 7, 1968, he was in a tavern at Homan and Lake, drinking with the defendant. He left the tavern and proceeded with two girls to 3359 Maple. As he was proceeding back to the tavern he observed a police vehicle come down the alley. He ran back upstairs and observed the defendant standing in the alley. The defendant was not jacking up a car and did not run from the police. He testified that the defendant was drunk that evening.

Charles William Hoy, the defendant, testified that on January 7, 1968, he was drinking in a tavern until approximately 2:00 a.m. He left the tavern going to 3309 Maple. As he was taking a short cut through the alley he was arrested. He denied ever jacking up an automobile. He testified that the first time he noticed the squad car he was standing by a 1968 Buick urinating. The police came up and asked him to come over to the squad car. He walked over to the squad car and when asked what he was doing, he told the officers that he had been urinating. He denied that he ever ran from the police.

Defendant first argues that he was not proven guilty of theft beyond a reasonable doubt because the evidence did not establish that he was exerting unauthorized control over the

automobile at the time of his arrest. The defendant was charged with theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1967, ch.38, par.16-1(a)(1)) which states:

"A person commits theft when he knowingly:
(a) obtains or exerts unauthorized control over property of the owner; *** and (1) intends to deprive the owner permanently of the use or benefit of the property."

To exert unauthorized control means control exercised over the property of another without the consent of the owner. People v. Bullock, 123 Ill.App.2d 30, 259 N.E.2d 641.

In the case at bar, the 1963 Pontiac was moved without consent of the owner and was discovered in an alley at 2:15 a.m. The car was jacked up and one of the wheels was in the process of being removed. The defendant was seen jacking up the car by Officers Hall and Collins. The ignition to the automobile had been ripped out and the wires were hanging loose. Upon seeing the police car the defendant ran and hid under a nearby abandoned car. Under these circumstances we conclude that the defendant exerted unauthorized control over the 1963 Pontiac.

Defendant also argues that he was not proven guilty beyond a reasonable doubt because the State's testimony is contradictory and his explanation is reasonable. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt will the finding of the trial judge be disturbed. People v. Catlett, 48 Ill.2d 56, 286 N.E.2d 378. A trial court has no obligation to believe a defendant's testimony. People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526. In the case at bar the trial court was in a better position to observe the demeanor of the witnesses during trial. The trial judge chose to believe the State's evidence rather than that of the defendant and his witness. The testimony of Officers Hall and Collins was sufficient to establish the defendant's guilt beyond a reasonable

doubt. Under these circumstances, this court will not disturb the finding of the trial court.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Justice Schwartz did not participate.

58137

PEOPLE OF THE STATE OF ILLINOIS,	)	ABST
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
	)	Honorable
HENRY NEAL,	)	Lawrence I. Genesen,
	)	Presiding.
Defendant-Appellant.))	

PER CURIAM:

Defendant Henry Neal was found guilty after a bench trial of the offense of possession of a hypodermic needle, in violation of section 22-50 of the Criminal Code, and was sentenced to a term of six months in jail. (Ill.Rev.Stat., 1969, ch. 38, para. 22-50.) On appeal he raises two contentions: that the complaint for search warrant issued in this case did not contain sufficient facts from which the informer's reliability could be judged and that his guilt was not proven beyond a reasonable doubt. (The appeal has been transferred to this court from the Illinois Supreme Court.)

At a hearing on a motion to suppress the search warrant defendant argued, as he does on appeal, that the warrant was defective because the complaint for the warrant filed by Chicago Police Officer Floyd Davis recited as grounds for establishing the reliability of the informer, who had allegedly purchased narcotics from the defendant on the day prior to the issuance of the warrant, that the informer "in the past has supplied reporting

officer and members of his unit with information which has resulted in the recovery of (narcotics and related paraphernalia) and led to the arrest and conviction of three persons" on narcotics charges. Defendant contends that since there was no way of ascertaining from the face of the complaint for search warrant what information was supplied to the complaining officer and what was supplied to his fellow officers relative to the three prior arrests and convictions, the allegation of that matter in the complaint was hearsay, and no one actually took the responsibility for attesting to the informer's reliability. The sufficiency of the facts and circumstances contained in the complaint for search warrant are unchallenged, other than in the above respect.

A complaint for a search warrant may be based upon the hearsay evidence given by an informer, but the complaint must set forth the underlying circumstances upon which the informer's conclusions are based and must also set forth grounds evidencing his reliability. Aguilar v. Texas, 378 U.S. 108. The affiant may also base his request upon the information received from fellow officers who are engaged in a common investigation. United States v. Ventresca, 380 U.S. 102. Moreover, as stated in People v. McGrain, 38 Ill.2d 189, 230 N.E.2d 699, applications for search warrants must be tested and interpreted in a common-sense, realistic fashion.

In the instant case the officer's complaint for search warrant recited the specific location of the place and the name

of the person to be searched; it recited that the informer, who was successfully employed in the past by the affiant and by other officers in his unit resulting in three narcotics-related arrests and convictions, had, the day prior, purchased \$10 worth of narcotics from defendant in the named apartment; and it recited that independent observation of defendant's apartment by the officer revealed a number of persons entering and leaving defendant's premises within a short period of time.

The fact that the affiant, in swearing out the complaint for the search warrant, relied in part upon the past successful employment of the informer by other members of the unit of the Chicago Police Department to which the affiant was attached does not render the warrant invalid. It would be incongruous to hold that a police officer may take the word of his fellow officers when engaged in a "common investigation" as grounds for a search warrant, and then to hold that he may not take their word as to the reliability of an informer successfully used by them in the past on related matters as a basis for the issuance of a warrant. See: People v. McGrain; United States v. Ventresca; and People v. Levin (1973), 111.App.3d (No. 57496-7, filed June 11, 1973).

Applications for search warrants must be tested and interpreted in a "common-sense and realistic fashion" and the acceptance by an affiant of a fellow officer's word as to an informer's past successful employment by the latter officer in related matters comes

within that approach. See: Dunn v. Municipal Court, Eureka Judicial District, 34 Cal. Rptr. 251, 259-60, 220 Cal. App.2d 858. To hold otherwise under these circumstances would impair the effective use of informers in narcotics cases.

The cases cited by defendant in support of this position involve applications for search warrants containing wording substantially different from that contained in the complaint for search warrant here, in that in those cases the applications either state no facts upon which the officer based his conclusion that the informer was reliable, or the previous information given was not shown to have been accurate. See e.g., People v. Young, 4 Ill. App.3d 602, 279 N.E.2d 392; People v. Parker, 42 Ill.2d 42, 245 N.E.2d 487; People v. Considine, 107 Ill.App.2d 389, 246 N.E.2d 81; People v. McClellan, 34 Ill.2d 572, 218 N.E.2d 97.

Defendant also contends that his guilt was not proven beyond a reasonable doubt because the People failed to prove that he was in possession of narcotics paraphernalia.

Arresting Officer Davis testified at trial that he arrived at the building in which defendant lived with the search warrant (which had been issued that same day); that he spoke to a person on the premises who represented himself to be the manager of the second floor apartments or rooms in the building; that he ascertained which room or apartment belonged to the defendant; that he

found the door to that room locked; and that as he forced the door open, defendant entered the building, the officer announced his office and the defendant invited the officer into the apartment, stating that "he was clean." Inside the apartment, the officer found a paper bag containing hypodermic needles and eyedroppers at the foot of the defendant's bed. The officer also testified that on his prior observation of the second floor of the building (as recited in the application for search warrant) the officer observed several persons entering and leaving the second floor premises of the defendant within a short period of time.

Where contraband is found on premises possessed by and under the control of the defendant, such fact gives rise to the inference that he had knowledge and possession of the contraband, which in turn is sufficient to sustain a conviction for the possession of the contraband, absent other facts and circumstances giving rise to a reasonable doubt. People v. Nettles, 23 Ill.2d 306, 178 N.E.2d 361.

There are no circumstances in the record which militate against the inference that defendant knew of and was in the possession of the narcotics paraphernalia, which arises from the undisputed proof of his possession and control of the apartment wherein those articles were found. The cases cited by the defendant in support of his position in this regard are not in point.

For these reasons the judgment of the Circuit Court
of Cook County is affirmed.

Judgment affirmed.

Third Division: Justice Schwartz did not participate.

No. 71-287

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	County of Pulaski County.
Plaintiff-Appellee,)	
)	
vs.)	
)	
DONALD DILLARD BROWN,)	
	)	Hon. Jack C. Morris,
Defendant-Appellant.	)	Judge Presiding.

PER CURIAM:

This is an appeal from an order denying petitioner's Post-Conviction Petition after a full evidentiary hearing. Appellant contends that the Court below abused its discretion in not overturning his conviction in a jury trial of charges of rape and armed robbery. Defendant raises three points on appeal, each of which he cites as grounds for finding a substantial violation of his constitutional rights.

The first concerns an alleged ex parte meeting between the trial judge and the State's Attorney during a recess in the proceedings. From our review of the record we are unable to determine that a meeting actually took place. The State's Attorney admitted having retired to the same anteroom during a recess as the judge but denied having any ex parte conversation with the judge concerning the trial. However, there is no evidence that the two conducted any sort of meeting or even spoke to each other. Defendant seems content to show that it was very possible that they had been in each other's presence during those ten minutes or so.

Appellant cites and relies upon cases which hold it to be reversible error for a trier of fact to consider evidence outside the record or received outside the presence of the defendant. We have no quarrel with the rule of those cases, as applied by People v. Rivers, 410 Ill. 410, 102 N.E.2d 303. However, this case was tried before a jury who were the triers of fact. Since there is no showing

that the jury heard or considered evidence received outside the presence of the defendant or that the verdict of guilty rendered by the jury was in any way affected or influenced as a result of the alleged meeting, no prejudice has resulted to defendant and his argument in this connection is unavailing. Even if we assume that there was a meeting between the judge and prosecuting attorney it is not evident from the record ~~and~~^{THAT} the trial judge in any way acted improperly in regard to his rulings or otherwise following such meeting. We note, too, that defense counsel did not raise any question regarding the possibility of this meeting at the trial.

Appellant next contends that he was denied a fair trial because he was forced to use a peremptory challenge to remove an ill juror from the panel. Chapter 78, section 2, Ill.Rev.Stat. provides that jurors and prospective jurors must be in possession of natural faculties and not infirm or decrepit. Section 14 specifies that prospective jurors who do not meet these and other requirements of section 2 can be challenged for cause. But appellant did not challenge the juror for cause, he merely excused her by exercising a peremptory challenge. Appellant now asserts that he neglected to challenge the witness for cause because he felt that the trial judge would rule against him because of the judge's statements made during voir dire examination. The fact still remains that appellant made no attempt on voir dire examination to have the witness removed for cause. Moreover, the defendant did not exhaust his peremptory challenges and therefore his use of a peremptory challenge is immaterial. Graff v. People, 208 Ill. 312, 70 N.E. 299.

Appellant's final contention is that a juror was admitted to the jury panel after making statements on voir dire which later were discovered to have been misleading and perhaps erroneous. The appellant presented testimony at the hearing that a juror had discussed elements of the case with a third person and a deputy sheriff. However, both the juror and the deputy sheriff denied this conversation in their testimony at the hearing. Furthermore, appellant claims that the juror misled the court and defense counsel on voir dire by not offering information that she was acquainted professionally and politically with the sheriff and the State's Attorney. This was brought out at the post-conviction hearing. However, it appears that

appellant's attorney conducted a vigorous examination^{of} the juror on voir dire and elicited that she did know the people involved, including the family of the defendant, the victim, the sheriff, and others. She was a well-known figure about town and would be expected to know such people. She also admitted to knowing a little about the case from the newspapers. The appellant's attorney had ample opportunity to explore these areas further, but chose not to and allowed the juror to remain. It should be noted that the juror testified that she would judge all the evidence and render a verdict consistent with the evidence and based on nothing else. Since the factors now complained of were fully explored during voir dire examination and the juror was accepted upon the trial panel with knowledge of the circumstances, the defendant's complaint in this regard is without merit.

A noteworthy feature of this case is its nature as a post-conviction action. Hearings under the Post Conviction Hearing Act, (Ill.Rev.Stat., ch. 39, sec. 122-1 et seq.), are civil in nature and the burden of proving a substantial deprivation of constitutional rights lies upon the petitioner. Furthermore, evidence given at a post-conviction hearing is to be weighed for credibility by the hearing judge and his decision should stand except in the fact of clear abuse. People v. Wease, 44 Ill.2d 453, 255 N.E.2d 426; People v. Harper, 43 Ill.2d 368, 253 N.E.2d 451; People v. Downen, 45 Ill.2d 197, 258 N.E.2d 337. There is virtually no point of contention by appellant that was not refuted by testimony at the hearing. In such a case it is for the hearing judge to determine the veracity of the testimony and to give it its due weight. It seems clear in this case that the hearing judge's decision was not against the manifest weight of the evidence and did not constitute an abuse of discretion. Appellant was afforded a full and open hearing on his Post-Conviction Petition, the petition was denied and that judgment is affirmed.

Affirmed.

PUBLISH ABSTRACT ONLY.

1-2 I.A.³ 607
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 Walter T. [unclear]
 ABST
 CLERK OF THE COURT

IN THE
 APPELLATE COURT OF ILLINOIS
 FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
 Ex Rel. GUY ROBERT WOODS,)
)
 Appellant,)
)
 vs.)
)
 ELZA BRANTLEY, WARDEN, ILLINOIS)
 STATE PENITENTIARY, MENARD)
 BRANCH,)
)
 Appellee.)

Appeal from the Circuit Court of
 Montgomery County.

Honorable William A. Ginos, Jr.
 Judge Presiding.

PER CURIAM:

Appellant was convicted of theft in Montgomery County and sentenced to two to five years in the penitentiary. Appellant filed a petition for habeas corpus in Montgomery County claiming that he was being illegally detained because the mittimus issued by the trial court mistakenly read "burglary" instead of "theft." A hearing was held, and the court corrected the mittimus and dismissed the petition for habeas corpus. Appeal was based on the trial court's alleged lack of jurisdiction to correct the mittimus. The Illinois Defender Project was appointed to perfect the appeal, and subsequently filed a motion to be allowed to withdraw as counsel on appeal, on the grounds that the appeal was totally without merit. The ruling was stayed pending filing by appellant of objections or a pro se brief and notice of this opportunity was served on appellant. No opposition to the motion has been filed.

The Supreme Court of the United States set down the requirements to be fulfilled by an attorney seeking to withdraw based on lack of merit of the appeal. Anders v. California, 286 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493, requires the attorney to file a brief with the appellate court, providing appellant with a copy, outlining any possible points which appear on the record of the trial. The Supreme Court of Illinois further outlined these requirements in People v. Jones, 38 Ill.2d 384, 231 N.E.2d 90. In that case, the Court required the attorney to analyse the case and file a memorandum stating his legal conclusion of the lack of merit of the appeal, citing the record, and

showing authority for the conclusion. In the instant case, the Illinois Defender Project has complied with these requirements. Its brief contains specific citations from the record and quotes strong authority in opposition to appellant's contentions. It also appears that IDP properly filed a copy with the appellant as required by Anders, supra. Consequently, this Court grants the motion to allow the Illinois Defender Project to withdraw as counsel on appeal.

Having reviewed the record, we further hold that appellant's contentions are of no consequence. The law in Illinois is clear that a mittimus is not a part of the common law record and error in the mittimus is not assignable as error in the trial proceedings. Detention is based not on the mittimus, but upon the due and proper conviction and sentencing by a competent trial court (People v. Cox, 401 Ill. 432, 82 N.E.2d 463; People v. Troesch, 57 Ill.App.2d 466, 206 N.E.2d 468).

The judgment of the circuit court of Montgomery County denying appellant's petition for habeas corpus is affirmed. Nothing in this opinion is to be construed as prejudicing in any way appellant's previously-docketed direct appeal to this court, based on alleged errors in the trial court.

Affirmed.

PUBLISH ABSTRACT ONLY.

No. 73-130

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED

ABST

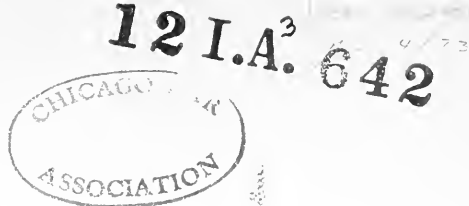
PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	Appeal from the Circuit Court of
	)	Randolph County.
vs.)	
)	
JACK LANDIS, JR.,)	
)	
Petitioner-Appellant.	)	Honorable Carl Becker,
	)	Judge Presiding.

PER CURIAM:

Appellant was convicted of aggravated kidnapping and sentenced to an indeterminate term of five to twenty years. He filed a habeas corpus petition in the circuit court of Randolph County asserting that the sentence was excessive. The petition was denied and the Illinois Defender Project was appointed to perfect an appeal from that ruling. The Defender Project has filed a memorandum in compliance with Anders v. California, 386 U.S. 738, analyzing the law in Illinois pertinent to appellant's contentions and concluding that the appeal is without merit. The appellant has filed his pro se arguments in support of his position.

Having reviewed the record, appellant's arguments and the memorandum filed by the Defender Project, we conclude that the appeal is without merit. The law in Illinois has long been settled that an allegation that sentence was excessive is not a proper basis for relief by means of habeas corpus (People v. Wilson, 391 Ill. 463, 63 N.E.2d 488, cert. denied 327 U.S. 801). The sentence complained of was imposed more than eleven years ago; even the most liberal construction of the petition could not recast it in a form which would allow the court to afford any relief to the appellant. Therefore, the judgment of the circuit court of Randolph County denying the petition for habeas corpus is affirmed.

Affirmed.



55002

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
PAUL ROBERTS, a/k/a MAURICE)	
JONES (Impleaded),	)	Hon. James J. Mejda,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Paul Roberts, otherwise known as Maurice Jones (defendant) and Don S. Crocton were jointly indicted for attempt armed robbery. (Ill.Rev.Stat. 1967, ch.38, par.8-4.) After a jury trial, both were found guilty. Defendant was sentenced to the penitentiary for two to ten years. Crocton was placed on probation for five years, with the first nine months to be served at the Illinois State Farm. Defendant appeals.

Both defendant and Crocton were represented by the same attorney, privately retained by them. A petition for severance was filed on behalf of Crocton but denied by the court. There was a joint trial at which Crocton testified in his own behalf and defendant did not take the stand. On defendant's appeal, the sole and only issue raised is that he was denied effective assistance of counsel because his trial attorney was placed in an inconsistent position by being obliged to represent two defendants with diverse interests. Consideration of this contention requires a statement of the facts.

The petition for severance filed by Crocton alleged that a gun with cartridges and a loan application form had been found upon the person of defendant. These items were incriminating

evidence which the State would use against Crocton and this would prejudice the jury so as to deny him a fair and impartial trial. Crocton also alleged that he intended to call defendant as a witness in his behalf but that defendant had previously been convicted of a provable felony and therefore that he would refuse to testify if called. If he were unable to call defendant as a witness, this would deprive Crocton of a substantial defense. The petition further alleged that Crocton would offer a defense which might be antagonistic to that of defendant and this also would deprive Crocton of a fair and impartial trial.

After a full hearing, the motion for severance was denied. The court commented that Crocton had failed to establish that the defenses which might be asserted by the two defendants would be antagonistic. The granting or denial of this motion for severance was a matter addressed to the sound discretion of the trial court. The issue was whether the defenses to be offered by the two defendants were of such antagonistic nature that a severance was imperative to insure a fair trial. People v. Canaday, 49 Ill.2d 416, 424, 275 N.E.2d 356; People v. Humphrey, 129 Ill.App.2d 404, 413, 414, 262 N.E.2d 721.

The trial court acted properly in denying the motion for severance. Neither defendant nor Crocton had made statements or admissions inculpatory of the other. The fact that one of the defendants had a record of felony conviction did not in itself make a severance imperative. In addition, as our review of the evidence will establish, the testimony of defendant would not furnish any comfort to Crocton.

The evidence showed that on the afternoon of April 28, 1969, defendant entered the office of a loan company and made inquiry about a loan. Defendant then stated to the manager of the office that he would wait for his cosigner. Defendant left the office with the announced intention of purchasing cigarettes. The manager then contacted the police. Defendant returned shortly and he and the manager went into a booth together. Crocton entered the booth and was introduced by defendant as his cosigner. The manager left the booth to take a telephone call. When he returned, defendant showed him the loan application, upon which he had written, "This is a holdup, don't make any false moves." and then produced a gun.

At that time, a police officer entered the office. Crocton told defendant that the police officer had come in. Crocton then left the booth and started to walk toward the front door. Defendant remained and asked the manager if he had called the police. The manager stated that he did not. Defendant then told the manager that he wanted to make a telephone call. He put the gun into his belt and walked out of the booth. The manager pointed to defendant and motioned to the police officer to indicate that defendant was armed. At that time, defendant was holding the telephone and the officer told him to put his hands up and get against the wall. As the officer was in the process of searching defendant, another officer entered the front door. These police officers then searched defendant and Crocton. A loaded gun was taken from defendant. Crocton was in possession of a knife.

Crocton took the stand in his own behalf and testified that at the time in question he was employed by the Boy Scouts of

America and that he had actually accompanied defendant as a cosigner. He did not see defendant use a pistol and did not see the gun in his possession. He testified that he first became aware that he was charged with robbery when the reports were being filled out at the police station. The State called an official of the Boy Scouts of America as a rebuttal witness. The employment records of that organization indicated that Crocton had resigned from his employment in January of 1969, some three months before the occurrence. As stated, defendant did not take the stand in his own behalf.

This evidence shows that the guilt of defendant and of Crocton is established beyond reasonable doubt by the testimony of credible witnesses. It is also apparent that defendant was convicted only after a fair and impartial trial. The contention that defendant was denied the effective assistance of counsel has no merit. The record shows that there was no antagonism or incompatibility between the two defendants. In fact, it may well be urged that Crocton's testimony that he never saw defendant in possession of a gun was helpful to defendant's position. Both Crocton and defendant were guilty beyond reasonable doubt and neither had any valid defense to the indictment.

For these reasons, the authorities cited by defendant are not applicable here. In People v. Ware, 39 Ill.2d 66, 233 N.E. 2d 421, one defendant pleaded not guilty. The codefendant pleaded guilty and testified against the other. Under these circumstances, there was definite divergence and "complete antagonism" between the two defendants who were represented by one attorney. (See 39 Ill.2d at 68.) In People v. Friedrich, 20 Ill.2d 240, 169 N.E.2d 752, the trial court determined that

a conflict of interest existed between two defendants who were represented by the same attorney. The court required one defendant to discharge counsel of his own choice because of this conflict. The Supreme Court, therefore, held that this defendant was deprived of the basic right to counsel of his own choice and that he had a right to waive the issue regarding conflict of interest. Friedrich has no application to the case at bar.

In our opinion, this case is governed by a number of decisions in which our courts of review have found no error in representation of multiple defendants by the same attorney where no antagonism existed and there was no prejudice to any defendant. People v. Cheatham, 6 Ill.App.3d 1079, 286 N.E.2d 597, differentiating People v. Ware, 39 Ill.2d 66, 233 N.E.2d 421 and citing People v. Williams, 36 Ill.2d 194, 222 N.E.2d 321; People v. McCasle, 35 Ill.2d 552, 221 N.E.2d 227 and People v. Somerville, 42 Ill.2d 1, 245 N.E.2d 461.

The record here shows that, far from being denied effective representation of counsel, defendant was, in fact, most effectively represented. The evidence in aggravation showed that defendant had a lengthy record of previous convictions including at least one for robbery. The sentence imposed was actually an excellent result from the point of view of defense counsel. In the light of the evidence presented here, no counsel or combination of lawyers could possibly have obtained a not guilty verdict. We find no error in this record.

Judgment affirmed.

BURKE, P.J., and HALLETT, J., concur.



12 I.A.³ 683
May 29/73

57442

NIAGARA LOUNGE, INC., MARIA
KRAMER, President,

ABST

Plaintiff-Appellant,

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

vs.

LICENSE APPEAL COMMISSION OF THE
CITY OF CHICAGO, A. L. CRONIN,
CHAIRMAN, and RICHARD J. DALEY,
LOCAL LIQUOR CONTROL COMMISSIONER
OF THE CITY OF CHICAGO,

HONORABLE EDWARD J. EGAN,
Presiding.

Defendants-Appellees.)

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Plaintiff appeals from a judgment of the Circuit Court of Cook County sustaining an order of the License Appeal Commission which in turn sustained an order of the Local Liquor Control Commissioner of the City of Chicago revoking plaintiff's liquor license, on two grounds of solicitation for the purpose of prostitution and on one ground of solicitation for drinks, in violation of Sections 149 and 185 of the Illinois Liquor Control Act. (Ill. Rev. Stat. 1969, ch. 43, pars. 149, 185.)

The findings of the Local Liquor Commissioner were as follows:

1. On October 31, 1970, the licensee corporation, by and through its agent, solicited a police officer on the subject premises for purposes of prostitution, contrary to the ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission.
2. On October 31, 1970, the licensee corporation, by and through its agent, permitted a female on the licensed premises to solicit a police officer for purposes of prostitution, contrary to the ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission.
3. On October 31, 1970, the licensee corporation, by and through its agent, solicited police officers on the subject premises for drinks, contrary to the ordinances of the City of Chicago, Statutes of the State of Illinois and Rules of the Illinois Liquor Control Commission.

At the hearing before the Commissioner, a Chicago police officer testified that on October 31, 1970, he entered the plaintiff's premises, seated himself at the bar, and ordered a drink. He testified that he asked the bartender, "What does a guy have to do around here to get a girl?" and that the bartender replied, "All you have to do is stop one and ask them to have a drink with you." Thereafter, one of the plaintiff's female employees, a dancer, sat next to the officer, and she and the officer had a conversation. The officer then stated to the bartender, in the presence of the female employee, that she "was going to lay me for \$50 in her apartment," to which the bartender responded that "she was a good girl and I wouldn't have any problems with her." The officer testified that he then gave the woman \$50, which she placed in her purse. The officer further testified that he offered the bartender \$10 for his "trouble," that the bartender initially refused the money because he was afraid and because his boss was looking, and that the officer kept the money until the "time was right," at which time the bartender "again" asked for it. The bartender and the woman employee were thereafter placed under arrest, and the money given to them by the officer was confiscated.

The bartender testified that when the person, known to the witness at the time of the hearing as a police officer, entered the premises the latter asked the witness where he could find a girl and the witness told him that he knew none. He further testified that the officer was conversing with a girl seated at the bar, but that the witness was unable to hear any of the conversation between them. He stated that the officer forced him to accept a \$10 bill, which he was unable to refuse. The bartender denied that the officer told him that the woman was going "to lay him for \$50."

Evidence was also adduced through another police officer and through two other of plaintiff's female employees concerning

the alleged solicitation for drinks .

All three findings of the Commissioner were sustained by the License Appeal Commission, as having been "supported by substantial evidence in the light of the whole record." The judgment of the Circuit Court recited in part that the evidence established that the woman who had been given the \$50 by the officer was an agent of the plaintiff, that there was sufficient evidence that she did in fact solicit the police officer for the purpose of prostitution and that the evidence was sufficient to support the conclusion that the solicitation was carried out with the knowledge and consent of the bartender; the court expressly made no finding as to the sufficiency of the evidence to establish a finding of solicitation for drinks.

On this appeal, the defendants have expressly waived any grounds which could have been advanced in support of the Local Liquor Commissioner's findings 2 and 3, stating as to number 2 that the charge implicit therein related to solicitation by a non-employee of the plaintiff, whereas the evidence showed the solicitation here to have been by the female dancer employee, and stating as to finding number 3 that there was no evidence adduced showing a direct solicitation for drinks by plaintiff's agents.

The record and the briefs filed in this matter show that the parties hereto and the Circuit Court used the terms "solicit" and "solicitation" in their ordinary, everyday context, rather than in the strict, legal sense as interpreted by the court in Daley v. Resnick, 5 Ill.App.3d 683, 685, 284 N.E.2d 39. The Resnick court defined the term "solicitation" in the context of Section 11-15 of the Criminal Code, as applying only to the "runner" or the "middle man" rather than to solicitation by the prostitute herself, but the court there was aided in its determination in that regard by the People's admission that the charge as to the violation of the Liquor Control Act was based upon Section 11-15 of the Criminal Code,

prohibiting the "solicitation for prostitution." (Ill. Rev. Stat. 1969, ch. 38, par. 11-15.)

In the instant case, on the other hand, the term "solicit" is employed by the parties in its everyday context. While the charge inherent in the Commissioner's finding number 1 contains language almost identical to the language contained in the charge in the Resnick case, the language contained in the charge inherent in finding number 2 in the instant case employs the term "solicit" in direct contradiction of the rationale developed in the Resnick case, in that the prostitute here was charged with soliciting for herself; the use of the term in that manner reveals that the term "solicit" employed in the three charges in the instant case was intended in its ordinary manner. Plaintiff and defendant's briefs also employ the term in the same manner, as did the order of the Circuit Court, in that the female dancer employee of the licensee was referred to as having solicited the police officer for purposes of prostitution on her own behalf.

The term "solicitation," as used in this case, can be said to be synonymous with the language contained in Section 11-14 of the Criminal Code, that of offering or agreeing to perform, for money, an act of sexual intercourse or deviate sexual conduct. (Ill. Rev. Stat. 1969, ch. 38, par. 11-14.) The foregoing summary of the evidence reveals that, if believed, the testimony of the police officer clearly proved that the licensee's female dancer employee solicited him for the purposes of prostitution, so as to constitute a violation of Section 11-14 of the Criminal Code and a resultant violation of the Illinois Liquor Control Act. (Ill. Rev. Stat. 1969, ch. 38, par. 11-14; ch. 43, pars. 149, 185.)

Plaintiff's argument, that the licensee must have knowledge of the solicitation in order to be held responsible, applies only to situations where the licensee is charged with "permitting" solicitation on the licensed premises and not where, as here, there is a direct solicitation by the licensee's agent. See e.g., Park

Liquors v. Illinois Liquor Control Commission, 122 Ill.App.2d 437, 450, 259 N.E.2d 331. The cases cited by plaintiff in support of this position are, for that reason, not applicable to the instant factual situation. See Daley v. License Appeal Commission, 54 Ill.App.2d 265, 204 N.E.2d 36; Evans v. License Appeal Commission, 95 Ill.App.2d 121, 237 N.E.2d 817; Hi-Hat Lounge v. Illinois Liquor Control Commission, 97 Ill.App.2d 443, 240 N.E.2d 251.

For these reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Justice Downing did not participate.

12 I.A.³ 734
(24540--4M--9-70) 1050

STATE OF ILLINOIS

ABST

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE DELAND SIMPSON, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of July A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11833

Agenda 73-36

John H. Balster, d/b/a
Balster Truck Service,

Plaintiff,

vs.

Road District No. 11,

Defendant.

¶ ¶ ¶

Road District No. 11,

Third Party Plaintiff
Appellee,

vs.

Lawrence R. Jordan and James
H. Clark,

Third Party Defendants-
Appellants.

)
Appeal from
Circuit Court
Menard County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Plaintiff Balster brought an action against Road District 11 for expenses incurred in hauling rock in 1971 for a road within that district. Additional parties were added which included

Colson, the road district commissioner in 1971; Jordan and Clark, who entered into an "inducement agreement"* with the Road District to provide maintenance for the road which had been graveled; and D-P Indian Point Limestone Products, who supplied the rock which was placed on the road. The trial court entered judgment in favor of Balster and against the Road District in the sum of \$324.25; in favor of D-P Indian Point and against Road District 11 in the sum of \$510, less any payments received since the filing of said suit; in favor of the Road District and against Jordan and Clark in the sum of \$234.25, less any payments received on the claim of D-P Indian Point since the filing of said suit. The trial court's opinion was based on the "inducement agreement" which required Jordan and Clark to furnish the rock and provide maintenance until the road was oiled. Under a quantum meruit theory, Jordan and Clark were found to have been unjustly enriched

*Inducements

Any person or persons interested in the establishment, widening, alteration or vacation of any township or district road is or are authorized to offer inducements to the highway commissioner or county superintendent of highways, as the case may be, for the establishment, widening, alteration or vacation of any such township or district road, by entering into contract with the commissioner or county superintendent, conditioned upon such establishment, widening, alteration or vacation, to pay money or other valuable thing to the district for the benefit of the road funds of the same; or to perform any labor, or construct any road, bridge or culvert on any road which such person or persons desires or desire to be established, widened or altered. Any such contracts in writing made with the highway commissioner or county superintendent shall be deemed good and valid in law and may be enforced by such commissioner or superintendent, or his successor in office, before any court having jurisdiction. (S.H.A., ch. 121, sec. 6-310.)

and the Road District was held entitled to recover. An appeal was filed by Jordan and Clark from this judgment. Defendants raise the question of whether or not the highway commissioner has the authority to enter into a contract offering inducements for the maintenance of a road, or whether such contracts are restricted by Illinois Revised Statutes, 1969, ch. 121, par. 6-310, to the construction of a road.

The testimony relates to the provisions of the "inducement agreement" between Clark, Jordan and the Road District. The agreement required defendants to construct a new road in 1967 at their own expense and to provide for the maintenance of that road in 1969 and 1970 until they oiled it. Upon completion of these requirements, maintenance responsibilities were to transfer to the Road District. Further testimony indicated that defendants failed to gravel the road in 1971, and that the road fell into disrepair in the spring of that year.

The judgment entered in this case cannot be said to be against the manifest weight of the evidence. There was no error of law in the proceedings below. A further recitation of the factual testimony would in our judgment serve no useful purpose, and an opinion thereon would have no precedential value. Accordingly, pursuant to Supreme Court Rule 23, the judgment of the circuit court of Menard County is affirmed.

JUDGMENT AFFIRMED.

TRAPP, SIMMONS, JJ., concur.

12 I.A.³ 738

ABST

No. 57820

RAYMOND F. BOCHANTIN, SR. and)
 MARY ANN BOCHANTIN,)
)
 Plaintiffs-Appellants,)
)
 vs.)
)
 GERTRUDE SCHROEDER,)
)
 Defendant-Appellee.)

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY

HONORABLE
 GEORGE FIEDLER,
 PRESIDING.

*
 PER CURIAM (Fifth Division, First District):

Plaintiffs appeal from a judgment entered on a jury verdict "for the plaintiffs with no damages" in a personal injury suit. Plaintiffs raise three issues on appeal: whether the verdict was contrary to the manifest weight of the evidence, whether the trial court's refusal to give one of plaintiffs' instructions or the court's giving defendant's verdict forms over plaintiffs' objections was reversible error, and whether statements made by defendant's attorney in final argument were so prejudicial as to deny plaintiffs a fair trial.

Raymond Bochantin testified that on February 18, 1967 he was driving his 1965 Ford Station Wagon with his wife and son as passengers when it was struck by an automobile owned and driven by defendant, Gertrude Schroeder. Plaintiffs' car was stationary when struck on the left rear side by defendant's right fender. When the collision occurred, plaintiff was thrown forward causing his chest and chin to strike the steering wheel, although the impact was not great enough to move the car forward. His son, sitting beside him was admittedly unhurt. Damage to the car was so slight that no repairs were sought. Two days later, complaining of pains in the chest, shoulders, right arm and elbow, he saw his family physician, Dr. Daniel Ludwig. Thereafter he saw Dr. Ludwig four or five times at his office. Raymond Bochantin was sent to Walther Memorial Hospital for x-rays, and he was given vitamin injections, diathermy treatments, and pain pills to help cure his condition. As a result of the collision, he lost two weeks wages amounting to \$400 and



paid a \$35 x-ray bill.

Mary Ann Bochantin testified that when the collision occurred, her neck and back were jerked to the right, and that immediately after this collision, she experienced pain in her neck. Later that evening, the pain in her neck became extreme and she called Dr. Ludwig, who prescribed medication. She saw the doctor at his office two days later and on eight separate occasions over a period of several weeks. She had x-rays at Walther Memorial Hospital. She was given vitamin injections, diathermy treatments, and a cervical collar, which she wore continuously for a period of two months. At no time before this collision had she experienced any pain in the area of her neck. Later in April and September of 1967, since her condition had not improved, she saw Dr. Leonard Smith, an orthopedic surgeon who examined her, took x-rays, and sent her back to Walther Memorial Hospital to receive additional physical therapy treatments. She has experienced continuously over the past five years pain and stiffness in her neck, limitation of motion, and an inability to sleep. She has been taking aspirin and applying heat, via a heating pad, as a means of self-help to remedy the pain in her neck. She admittedly did not receive any treatment after October 14, 1967.

Dr. Daniel Ludwig testified for the plaintiffs that he had known Mr. and Mrs. Bochantin for over fifteen years and was their family physician. He saw Mr. and Mrs. Bochantin in his office on February 20, 1967, took a history from them, conducted a complete physical examination, sent them to Walther Memorial Hospital for x-rays, and began treatment. Dr. Ludwig had made a notation in his file that Mrs. Bochantin "motions without pain." His testimony referred to no objective symptom in respect to Mrs. Bochantin and only "some muscular contusions" in respect to her husband. He also testified that he had x-rayed both plaintiffs one week before the accident. He stated that his bill of \$109 was a fair and reasonable charge.

Dr. Leonard Smith testified on behalf of the plaintiffs that he first saw Mary Ann Bochantin on April 20, 1967, at the request of Dr. Ludwig. He conducted a thorough physical examination on that date, and

related that Mrs. Bochantin complained of pain and stiffness in her neck, and an inability to turn her head or sleep on her back. His findings were that swelling, tenderness, and inflexibility of the vertebra existed, which could have occurred from a "fair amount of force." Dr. Smith further testified that he re-examined Mrs. Bochantin on September 19, 1967, and that her condition had not improved. He recommended physical therapy at Walther Memorial Hospital and the use of a heating pad at home. His bill was \$177 which he claimed was fair and reasonable. It was Dr. Smith's opinion that the injury sustained by Mrs. Bochantin was caused by the automobile collision which occurred on February 18, 1967, and that this injury was permanent in nature.

During the course of defense counsel's final argument, the following occurred:

MR. ROWE [Defendant's attorney]: *** You can ask for a sum of money which is astronomical and as I said at the beginning now you know why this lawsuit is filed, it is just believed by him that this is a place, it is much easier making money in the courtroom than going back and pounding a typewriter or driving a truck.

MR. HELLER: I object, Your Honor, this is prejudicial.

MR. ROWE: Well, I mean to be prejudicial.

MR. HELLER: I object.

THE COURT: Proceed with another point.

The case went to the jury, and the jury returned a verdict for the plaintiffs with no damages. The plaintiffs' post trial motion requesting a new trial on the issue of damages only, was denied, and this appeal follows.

OPINION

The jury determined that, as a factual matter, no damages resulted from the collision. The jury's function is to weigh witness credibility. (Hulke v. International Mfg. Co. (1957), 14 Ill.App.2d 5, 142 N.E.2d 717.) Even though defendant produced no witnesses of her own, the jury was acting within its discretion in finding that no damages resulted from the collision. The court in Jeffrey v. Chicago Transit Authority (1962), 37 Ill.App.2d 327, 329, 185 N.E. 2d 384, 386-5-6 stated:

The plaintiffs' own evidence is the only explanation of the result. Their testimony was self-contradictory and was, in some material matters, impeached. The jury could have found them unworthy of belief and their injuries feigned. The testimony of their doctor, which corroborated them, was such that the jury could have given it little credence' ****

The testimony of plaintiffs' witnesses was often contradictory, inconsistent and discredited in several respects. Bochantin's testimony at trial differed from what he said at a deposition in several important particulars: whether his son who was sitting in the front seat was injured and whether he went to the doctor's office or home after the accident and the conflict with Dr. Ludwig's testimony concerning the x-rays taken prior to the accident. While Mrs. Bochantin claimed to still have a great deal of pain, she had not sought any further treatment for her neck since she saw Dr. Smith in October, 1967. The trial was held February 16, 1972. Dr. Ludwig had made a notation in his file concerning his first post-accident examination of Mrs. Bochantin. Dr. Ludwig noted "motions without pain." Dr. Ludwig's testimony referred to no objective symptom in respect to Mrs. Bochantin and only "some muscular contusions" in respect to her husband. Dr. Smith testified that the damage to her vertebra could have occurred from "a fair amount of force." He also testified that there would be "discoloration and swelling" immediately after the accident, which was not consistent with Dr. Ludwig's testimony. Applying the Jeffrey test, we find that the verdict is not against the manifest weight of the evidence.

The next issue is whether the trial court's decision not to submit I.P.I. Instruction No. 23.01 and to submit "no damage" verdict forms to the jury was reversible error. I.P.I. Instruction No. 23.01, entitled "Admitted Liability" provides as follows:

The defendant has admitted liability for any injury which may have proximately resulted from the occurrence. You need only decide what injuries to the plaintiffs resulted from this occurrence and what amount of money will reasonably and fairly compensate the plaintiffs for those injuries.

The notes to I.P.I. Instruction No. 23.01 indicate that Jeffrey v. Chicago Transit Authority (1962), 37 Ill.App.2d 327, 185 N.E.2d 384, holds that a plaintiff is not necessarily entitled to at least nominal

damages (provided for in the instruction) where liability is admitted. The trial judge, apparently relying on Jeffrey, refused to give Instruction 23.01 and gave the jury verdict forms that allowed them to find for plaintiff, but "with no damages." Plaintiff attempts to distinguish Jeffrey and urges that Daly v. Vinci (1964), 51 Ill.App.2d 372, 201 N.E.2d 200 controls the case at bar. In Jeffrey where the injuries were superficial in nature and unsubstantiated by competent medical testimony there was a verdict of no damages, whereas in Daly the plaintiff had sustained a severe and permanent injury, and the same was corroborated by uncontradicted competent medical testimony there was a verdict of \$500. In Daly, the court distinguished Jeffrey on the ground that "there, the trial court jury found, and the Appellate Court agreed, that no actual damages were proven." (Daly v. Vinci (1964), 51 Ill.App.2d 372, 385, 201 N.E.2d 200, 206-7.) In the case at bar, as in Jeffrey, the jury by its verdict, determined that no actual damages were proven, and the conscientious and competent trial judge permitted it to stand. Since the evidence did justify a verdict of no damages, the instruction was properly refused, and the trial court properly gave the jury verdict forms allowing them to find for the plaintiff but "with no damages."

The final issue is whether statements made by defendant's attorney in his closing argument was so prejudicial as to deny plaintiffs a fair trial. When a case is defended on the ground that plaintiff and his witnesses should not be believed, it is to be expected that some language to that effect will be used and it is natural for plaintiffs to be offended by this implication. Regretfully, there is no nice way to say that a plaintiff or any other witness is not telling the truth. Svoboda v. Blevins (1966), 76 Ill.App.2d 277, 222 N.E.2d 219, cited by plaintiffs, is distinguishable since the conduct complained of in that case was not simply a remark or two on cross-examination, but repeated questioning and implications in spite of the court's admonishments during the trial as to how the plaintiff happened to go to a particular doctor, implying that he was sent to that doctor by the lawyer.

Counsel can urge all reasonable inferences and conclusions which may be properly drawn from the evidence and wide latitude should be allowed. (Maquire v. Waukegan Park District (1972), 4 Ill.App.3d 800, 282 N.E.2d 6.) We find that defense counsel's closing argument did not deny plaintiffs a fair trial.

The judgment of the circuit court is affirmed.

Affirmed.

*JUSTICE SULLIVAN took no part.

[ABSTRACT ONLY]

6-1-73
2 apin
5th.

12 I.A.³ 761

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

ALBERT BIRCH,)

Defendant-Appellant.)

Appeal from the Circuit

Court of Cook County,

Honorable Robert J. Collins,
Presiding.

PER CURIAM:

Albert Birch, hereafter called defendant, was originally charged by Indictment 68-2472 with unlawful possession of a narcotic drug and Indictment 69-2091 with attempt burglary and possession of burglary tools. On August 5, 1970, the defendant pleaded guilty and was admitted to probation for a period of five years with a condition that he enter the Federal Drug Rehabilitation Program. On May 3, 1972, a hearing was held on a Rule to Show Cause why defendant's probation should not be revoked. After the hearing, the defendant's probation was revoked and he was sentenced to a term of two to five years in the Illinois State Penitentiary. Defendant appeals.

At the hearing on the Rule to Show Cause why defendant's probation should not be revoked, he was represented by counsel. The probation department informed the court that the defendant had been convicted on October 1, 1971, of possession of a hypodermic needle and sentenced to serve 60 days in the House of Correction. The defendant admitted that he was the same person who was convicted on October 1,

1971. Defendant was specifically asked if he wished to contest the conviction and he stated that he did not. The defense attorney stipulated that the defendant was the same person who was so convicted. The defendant's probation was then revoked.

The public defender was appointed to represent the defendant on appeal. He has now filed a motion for leave to withdraw, accompanied by a brief in support thereof pursuant to Anders v. California, 386 U. S. 738. Copies of the motion and brief were mailed to the defendant on January 30, 1973, and he was advised that he had until April 16, 1973, to file any additional points he might choose in support of his appeal. Defendant has not responded.

The public defender's motion to withdraw states that after reviewing the entire record it was his belief that the only possible basis for appeal would be whether the defendant was denied procedural due process on the hearing on the Rule to Show Cause why his probation should not be terminated. In People v. Morales, 2 Ill.App.3d 358, 360, 276 N.E.2d 391, 392, we said:

"The procedure must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accordance with procedural methods, which include the right to counsel and a reasonable time to prepare a defense. People v. Walker, 122 Ill.App.2d 461, 259 N.E.2d 304."

Our study of the record indicates that the above procedure was followed by the trial judge in the case at bar. Defendant was

personally present at the hearing on the Rule to Show Cause and was represented by counsel. He was specifically informed by the trial judge that a subsequent conviction formed the basis for the violation of his probation. He made no objection to the proceedings. Defendant was asked by the trial judge if he wished to contest his subsequent conviction and defendant replied that he did not. Defendant admitted that he had been convicted of possession of a hypodermic needle and his counsel, within the defendant's presence, so stipulated. Proof of the defendant's violation of probation was clearly established by defendant's own statement as well as the statement of his counsel made in his presence. People v. Ward, 4 Ill.App.3d 631, 281 N.E.2d 703.

On May 7, 1973, the public defender filed a motion for a reduction of the defendant's minimum sentence to one-third of the maximum under the Unified Code of Corrections. Ill.Rev.Stat., 1971, ch. 38, para.105-8-1(c)(4). The Unified Code of Corrections, which became effective January 1, 1973, is applicable to cases on appeal since they have not yet reached a "final adjudication". People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269; People v. Pickett, ___ Ill.2d ___, ___ N.E.2d ___ (Nos. 44903, 44910, decided March, 1973). In the case at bar, the defendant was convicted of an offense which is classified in the Unified Code of Corrections as a Class 3 felony. The Unified Code

of Corrections provides that in Class 3 felonies, the minimum term "shall not be greater than one-third of the maximum term". Ill.Rev. Stat., 1971, ch. 38, para. 105-8-1(c)(4). This requirement necessitates the defendant's minimum sentence to be reduced to a term of one year and eight months.

Our examination of all the proceedings in accordance with the dictates of Anders reveals no additional possible grounds for appeal and we have concluded that the legal points raised, other than a reduction of defendant's minimum sentence, are not "arguable on their merits" and that the appeal is "wholly frivolous".

The public defender is given leave to withdraw and the defendant's minimum sentence is reduced to a term of one year and eight months. As modified, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed as modified.

Third Division. Justice Schwartz did not participate.

12 I.A.³ 806
CHIEF OF BAR
ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
)
)
TONEY CROSBY,)
)
Defendant-Appellant.)

ABST
Appeal from the Circuit
Court of Cook County.
Honorable Frank R. Petrone,
Presiding.

PER CURIAM:

Toney Crosby, hereafter called defendant, was charged with attempt theft in violation of section 8-4 of the Criminal Code. Ill.Rev.Stat., 1971, ch. 38, para. 8-4. After a bench trial, he was found guilty and sentenced to ten days in the House of Correction. On appeal, he contends that he was not proven guilty beyond a reasonable doubt and that the complaint charging him with attempt theft was fatally defective.

At trial, the following testimony was adduced:

Catherine Bankston testified that on November 22, 1971, she was looking out of the window of her office when she observed the defendant lift up the hood of her car. Defendant was working with his hands under the hood. She grabbed her coat and started to run out to the parking lot. She also alerted her co-worker who went to get the security guard. As she approached her automobile, the defendant slammed down the hood, walked around to the trunk of the automobile, hit it with his hand and then proceeded down the street.

When the security guard opened up her hood, she observed that the cables of her battery had been loosened and removed. Shortly thereafter, the defendant returned to the parking lot and was arrested by a police officer who had arrived on the scene.

Lorraine Wilson testified that she is a co-worker of Mrs. Bankston. On November 22, 1971, she looked out the window of the complainant's office and observed the defendant under the hood of the complainant's automobile. The defendant was working with his hands in the area of the battery. She immediately called the security guard and then took her coat and walked out toward the parking lot. She observed the defendant leave the parking lot and she followed him to his building down the street. The defendant went to his apartment and returned a few moments later. The defendant then returned to the parking lot, where he was placed under arrest.

Police Officer George Davis testified that on November 22, 1971, he effectuated the arrest of the defendant. A search of the defendant's person revealed pliers and a wrench. The defendant's hands had grease on them. The defendant, when arrested, stated that he was going to his car and had the tools to fix his car so that he could go to work. The defendant's car was parked on the south side of the parking lot and the complainant's automobile was parked on the north side of the parking lot. Officer Davis observed the complainant's automobile and noticed that the two connecting cables

had been removed and the battery had been shifted out of its holder. The defendant's car was missing a battery.

Toney Crosby, the defendant, testified that on November 22, 1971, he went to his automobile to go to work and found that his battery had been stolen. He then looked under the hoods of four or five cars in an attempt to find his battery, which was marked. After failing to find his battery, he went upstairs to his apartment to call a local garage to deliver a new battery. When he returned to the parking lot, he was placed under arrest. The defendant stated that he had the tools in his possession because he is a mechanic by trade.

The defendant first argues that the State failed to prove that he intended to commit the offense of theft and therefore did not prove him guilty beyond a reasonable doubt. In a trial for theft intent may be established from the facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill.App.3d 253, 280 N.E.2d 795. In the case at bar, the evidence was sufficient to show that the defendant intended to commit the offense of theft. The defendant was in need of a battery for his automobile. He was observed lifting the hood and working under the hood of the complainant's automobile which was parked on the opposite side of the lot from his. The complainant's automobile had the cables removed from the battery and the battery had been shifted from its normal position. The

defendant put down the hood and left the automobile only as the complainant approached her car. When arrested, the defendant had grease on his hands and had pliers and a wrench in his pocket. At the time of his arrest, defendant tried to explain the possession of the tools in his pocket by saying that he was going to fix his car, while at trial he testified that he had the tools because he was a mechanic. The evidence was sufficient to show that the defendant intended to steal the battery from the complainant's automobile. The defendant was proven guilty beyond a reasonable doubt.

The defendant's second argument is that the complaint was fatally defective because it left out the words "knowingly" and "unauthorized". In People v. Geary, 8 Ill.App.3d 633, 291 N.E.2d 13, we held that a complaint charging attempt theft, which left out the words "unauthorized" and "knowingly", was sufficient. In the case at bar, the complaint is sufficient.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

Third Division. Justice Schwartz did not participate.

PEOPLE OF THE STATE
OF ILLINOIS,

Plaintiff-Appellee,

vs.

THEODORE THOMPSON,

Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JOHN J. MC DONNELL,
Presiding.

ABST

PER CURIAM:

Theodore Thompson, defendant, was charged with the crimes of theft, unlawful use of weapons, and failure to produce a State Firearm Owner's identification card. After a bench trial, he was found guilty of all three charges and sentenced to one year in the House of Correction on each charge, all sentences to run concurrently. On appeal, the defendant argues:

- 1) that the State failed to prove him guilty of theft beyond a reasonable doubt;
- 2) that the trial court erred in sustaining the State's objection and striking the testimony of the police officer that the firearm involved was not operable;
- 3) that he was denied a hearing in aggravation and mitigation; and
- 4) that the sentences imposed were excessive.

The following evidence was adduced at trial.

Clarence W. Hughes, manager of Alco Drugs, testified that on June 11, 1971, at approximately 7:30 A.M., he observed the defendant take a container of Doan's Pills from the shelf of the store and put them in his pocket. The defendant then proceeded to the checkout counter, using the lane leading directly out of the store. As he attempted to leave, he was stopped by Police Officer Howard at the checkout counter. A search of defendant's person revealed the pills and a gun.

Officer Howard testified that on June 11, 1971, he was working part time at the Alco Drug Store. The manager told him the defendant had taken some Doan's Pills from the shelf and had put them in his pocket. Officer Howard stopped the defendant as he was going out the checkout lane and asked him if he still had the pills. The defendant replied that he did, and a search of his person revealed the pills in his right-hand coat pocket and a revolver in the left-hand coat pocket. Defendant did not produce a State Firearm Owner's identification card.

The defendant testified that on June 11, 1971, he was in the Alco Drug Store to get some Doan's Pills for his cousin; that he put the container of pills in his pocket while he looked at a towel, intending to pay for the pills, and that he was stopped before he reached the checkout counter. He further testified that he had a gun in his possession which he had found in an alley in the summer of 1970, and that he thought it was a "blank gun."

When Officer Howard was recalled as a witness and was asked if the gun would fire, he replied that it would not and was not operable. The State objected on the ground that the testimony was irrelevant. The objection was sustained and the testimony was stricken.

Defendant first argues that the State failed to prove him guilty of theft beyond a reasonable doubt, in that it did not establish that he intended to permanently deprive the owner of his property. It is well established that in a trial for theft, intent may and often must be proved by the facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill. App. 3d 253, 280 N.E. 2d 795. In the case

before us, the State's evidence established that the defendant entered the Alco Drug Store, put a bottle of Doan's Pills in his coat pocket, then proceeded to the front checkout counter, using the lane where he could go directly out of the store. As he was leaving the checkout lane he was stopped by Officer Howard, and admitted that he still had the container of pills in his possession. A search of the defendant revealed not only the pills, but also a gun. This evidence was more than sufficient for the trial court to determine that defendant was guilty of theft beyond a reasonable doubt. People v. Jamison, ___ Ill. App. 3d ___, ___ N.E. 2d ___ (No. 57453, decided May 3, 1973).

The defendant next argues that the trial court erred in sustaining objections to and striking the testimony of Officer Howard that the firearm taken from defendant was not operable. Defendant argues that this evidence was admissible, since if the gun was not operable he falls within the exception as stated in Ill. Rev. Stat. 1971, ch.38, par. 24-2(b)(4), that section 24-1(a)(4), under which defendant was convicted, shall not apply to "transportation of weapons broken down in a non-functioning state or not immediately accessible." In the instant case there was no evidence that the weapon involved was "broken down in a non-functioning state." The defendant testified that he thought the gun he was carrying was a "blank." He never testified that it was in any way broken down or disassembled. The stricken testimony of Officer Howard established only that the gun was not operable. The fact that a weapon may be a "blank gun" or may be not operable does not establish that it is "broken down in a non-functioning state." People v. Spompolis, 2 Ill. App. 3d 299, 276 N.E. 2d 464; People v. Halley, 131 Ill. App. 2d 1070, 268 N.E. 2d 449. Officer Howard's testimony that the firearm was not operable would not bring the defendant within the statutory exemption.

Defendant also argues that Officer Howard's testimony that the gun was not operable was admissible because if the gun was not operable it was not subject to regulation under the Firearms Statute [Ill. Rev. Stat. 1971, ch. 38, par.83-2]. That section states that no person may acquire or possess any firearm without having in his possession a Firearm Owner's identification card. In People v. Hughes, 123 Ill.App. 2d 115, 260 N.E. 2d 34, this court held that in a prosecution for unlawful possession of a firearm it was not necessary for the State to prove that the instrument was in operable condition. The fact that in the instant case the gun was not operable would not be a defense to the charge of failure to produce a State Firearm Owner's identification card.

Defendant next argues that he was denied a hearing in aggravation and mitigation. The burden of presenting mitigating circumstances and making a substantial showing of evidence in mitigation rests upon the defendant. People v. Muniz, 31 Ill. 2d 130, 198 N.E. 2d 855; People v. Parr, 130 Ill.App.2d 212, 264 N.E. 2d 850. In the case before us, defendant's failure to request a hearing in mitigation constituted a waiver thereof.

Defendant's final contention is that his sentence is excessive and should be reduced. At the time of trial defendant was 26 years old, and his only criminal record was that in 1967 he had been placed on probation for a period of one year on two charges of simple assault. The trial judge imposed a maximum sentence on each charge of one year in the House of Correction, with all sentences to run concurrently. A reviewing court is empowered under Supreme Court Rule 615(b)(4), Ill. Rev. Stat. 1971, ch. 110A, par. 615(b)(4), to reduce the punishment imposed by the trial court. The power, however, is exercised with caution and circumspection. People v. Johnson, 5 Ill.App. 3d 718, 284 N.E. 2d 48. Under all the facts and

circumstances in the instant case, we are of the opinion that the sentence imposed upon the defendant is excessive and that an appropriate sentence is imprisonment for a term of six months. The sentences imposed upon the defendant are consequently reduced to a term of six months, and the judgment of the Circuit Court is affirmed as modified.

Judgment affirmed as modified.

THIRD DIVISION

Justice McGloon did not participate.

58727



CITY OF CHICAGO,

Plaintiff-Appellee,

v.

HARRIS TRUST & SAVINGS BANK, TRUST
NO. 5133; ROBERT GROSSMAN; EILEEN
ZISOOK ISAACSON; SHARON ZISOOK
KOLESKY; SHELDON C. ZISOOK; LIBBY
GILLIS; and M. GILLIS,

Defendants-Appellants.

ABST

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
NATHAN J. KAPLAN,
Presiding.

MR. JUSTICE EGAN delivered the opinion of the court:

Petitioners, tenants of a building at 5535-41 South Kimbark in Chicago, filed a petition to intervene on February 9, 1973, in a complaint filed January 5, 1973, by the City of Chicago against the owners and operators of that building alleging a number of violations of the Building Code and seeking a fine, an injunction against further violation, the appointment of a receiver and an order to demolish the premises.

In the petition to intervene, the tenants alleged that the Code violations had existed for more than a year despite their negotiations with the owner; the building was structurally sound and capable of rehabilitation; because of the serious lack of adequate housing in the City of Chicago the tenants would find it "almost impossible to secure housing free from Code violations"; and, therefore, the best interests of the tenants would be served by remaining in their present housing while directing their efforts toward making the building safe.

The trial judge on March 6, 1973, denied the petition to intervene to which no objection was made by the City or the owners. It is from that order that the tenants appeal. Neither the City nor the owners have appeared in this court. We have advanced this appeal as an emergency matter on the motion of the petitioners.

The facts of this case are similar to City of Chicago v. Zik, 63 Ill.App.2d 445, 447-448, 211 N.E.2d 545, wherein this court reversed the trial court's denial of a tenant's right to intervene in a suit brought by the City of Chicago against the owners of property for violations of the Building Code. The court said:

Certainly the petitioners did have a direct interest in the outcome of litigation seeking demolition of the subject property since only by its continued existence could petitioners' leasehold interests be safeguarded.

We believe that case controlling here. The pleadings filed by the petitioners were sufficient and timely.

Therefore, the order is reversed and cause remanded with directions to allow the petition to intervene.

ORDER REVERSED AND
REMANDED WITH DIRECTIONS.

BURKE, P.J. and GOLDBERG, J. concur.

57324 & 57846

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	ABST
)	
v.	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
)	
In the Interest of	)	HONORABLE ERWIN MARTAY,
DOUGLAS BYNUM, a minor,	)	Presiding.
)	
Defendant-Appellant.)	

PER CURIAM:

Douglas Bynum, hereafter called defendant, appeals a judgment finding him delinquent, pursuant to Ill.Rev.Stat. 1971, ch. 37, par. 702-2, for committing the offense of theft. He was committed to Department of Corrections, Juvenile Division. Defendant argues that he was not proved guilty beyond a reasonable doubt.

At the adjudicatory hearing, defendant stipulated to ownership of the automobile in question. Thereafter, George Pratl, a Chicago Police Officer, testified that on October 4, 1971, at approximately 8:30 p.m., he was on duty in the vicinity of Barry and Seminary, Chicago, Illinois. As he was driving north on Seminary, he observed a 1964 Chevrolet, parked in the middle of an alley at the rear of an empty lot. He saw Douglas Bynum and Robert Stanley at the edge of the front seat of the car, getting either in or out of the automobile. He also observed George Stanley and Randall McAuley standing by the door of the automobile, approximately one and a half feet from the car. Officer Pratl stopped his automobile and waited at the edge of the alley. The four boys came out of the alley and Officer Pratl asked whose car that was. Defendant Bynum replied, "What car? I don't see no car." The four boys were not detained. Officer Pratl then proceeded to check the automobile and found that it was stolen at approximately 11:00 a.m. that morning. The ignition on the automobile was open so that

it could be started without a key and the engine was still warm. Officer Pratl knew the defendant Bynum prior to the incident in question and arrested him at his home the same evening.

Douglas Bynum, the defendant, age 16, testified that on October 4, 1971, he was going through the alley in question on his way to the Kenmore play lot. He observed a blue automobile parked in the alley but at no time opened, touched or entered that automobile.

Robert Stanley, George Stanley and Randall McAuley each testified that on October 4, 1971, they were walking through the alley in question with defendant Bynum on their way to the Kenmore play lot. They each denied approaching or entering the automobile in question.

Defendant maintains that the State's evidence failed to establish beyond a reasonable doubt that he had exclusive, unauthorized control over the car or that he intended to permanently deprive the owner of said automobile. The quantum of proof required in a juvenile delinquency proceeding is the same as that required for conviction in a criminal case. In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716; People v. Perry, 132 Ill.App.2d 326, 270 N.E.2d 272. It is well established in Illinois that recent, exclusive and unexplained possession of a stolen automobile gives rise to an inference of guilt of theft, absent other facts or circumstances which create a reasonable doubt. People v. Donald, 132 Ill.App.2d 598, 270 N.E.2d 85. In order to establish recent, exclusive possession so as to raise an inference of guilt, it must be established that the possession was exclusive in the accused so as to indicate that he and not someone else took the property. If the property is found in a place where another person could

have had access thereto as well as the accused, it cannot be said that the property was in the accused's exclusive possession and the circumstances will not be evidence of guilt. People v. Davis, 69 Ill.App.2d 120, 216 N.E.2d 490.

In the case at bar, the State's evidence failed to establish defendant's guilt beyond a reasonable doubt. The testimony of Officer Pratl, who was the only State's witness, established only that he observed four, young boys at a car which had been stolen nine hours earlier, parked in the middle of a public alley. He observed the defendant getting into or out of the car. The ignition on the automobile was not damaged and there was nothing to show that anyone entering the automobile would know that the car was stolen. The defendant was never seen driving the automobile in question and there was no evidence connecting him with the initial theft nine hours earlier. There was no evidence to show that the defendant was present in the automobile at the time it was driven into the alley. The only association between the defendant and the stolen automobile was that he was seen entering or exiting from the car, along with three other young boys when the car was parked in a public alley at night. This evidence was insufficient to establish the defendant's guilt on the charge of theft beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

JUDGMENT REVERSED.

First Division, Goldberg, J. not participating.

NO. 56870

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY
	)	ABST
vs.)	
)	
EZELL O. JENKINS,	)	HONORABLE
	)	SAUL A. EPTON,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM:

Ezell O. Jenkins (petitioner) was found guilty by a jury of the crime of armed robbery and was sentenced to a term of ten years to twenty years. A direct appeal from the judgment of conviction was subsequently filed, as was a pro se petition pursuant to the provisions of the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq.) The People filed a motion to dismiss the post-conviction petition and, while the direct appeal from the judgment of conviction was still pending in the Illinois Supreme Court where it had been filed, the trial court held a hearing on the motion to dismiss, after which the motion was sustained and the post-conviction petition was dismissed without an evidentiary hearing. Petitioner appealed the dismissal of the post-conviction petition directly to the Illinois Supreme Court, which subsequently transferred the appeal to this court. (The direct appeal from the judgment of conviction was also transferred by the Supreme Court to this court, which affirmed the judgment in an opinion filed on February 27, 1973: People v. Jenkins, ___ Ill. App. 3d ___, ___ N.E. 2d ___, General Number 56814, First District.)

Petitioner contends that: (1) the post-conviction petition should not have been dismissed without an evidentiary hearing since it contained averments of violation of petitioner's constitutional rights at trial; (2) the trial court erred in considering its own notes compiled at trial in deciding the motion to dismiss the post-conviction petition; and (3) this

court should "shape a remedy" to deter improper dismissals of post-conviction petitions.

The pro se post-conviction petition, filed within six months of the judgment of conviction and while the appeal therefrom was yet pending in the Supreme Court, alleged (a) petitioner was denied an evidentiary hearing on his motion to suppress physical evidence, to suppress identification testimony, and to suppress a confession; and (b) the trial court permitted petitioner to adduce evidence relative to his alleged drug addiction at the time of the perpetration of the armed robbery, but thereafter refused to instruct the jury as to such defense (see Ill. Rev. Stat. 1969, ch. 38, par. 6-3) and in fact usurped the function of the jury in this regard by finding that petitioner was not in an involuntarily drugged condition at the time of the robbery. The petition also questioned certain remarks made by the prosecutor during closing arguments to the jury.

The People's motion to dismiss alleged that the post-conviction petition failed to aver constitutional matters and in fact averred only bare statements. Hearing on the motion to dismiss was held in two sessions, owing to the fact that there was no report of proceedings presented to the judge at the hearing and owing to the fact that the judge (who was the same judge who had presided over the trial of the cause) wished to review the notes he took at the trial. During those hearings on the motion to dismiss, the prosecutor contended that the pro se post-conviction petition should be dismissed because the pendency of the direct appeal from the judgment of conviction gave rise to the doctrine of res judicata as to the issues raised in the petition (inasmuch as they were of an evidentiary and procedural nature and were matters of record), and, further, that no constitutional issue was presented by the petition. Counsel appointed to represent the petition in the post-

conviction proceedings stated that counsel who had represented petitioner at trial, had conferred with petitioner in person, had reviewed the transcript of the trial proceedings (which had been prepared but which apparently was not presented to the court), and had concluded, with the assent of the petitioner, that the matters raised in the pro se petition should be raised at the hearing. Petitioner's counsel, therefore, stood on the petition as filed, contending that the doctrine of res judicata was not applicable since the direct appeal was still pending, and that the petition raised questions of constitutional magnitude. The court related that its review of its notes refreshed its recollection of the proceedings at trial, and that the petition raised no constitutional matters; therefore, the petition was dismissed.

Assuming, without deciding, that the doctrine of res judicata would not have been applicable to the issues raised in the post-conviction petition at the time that the motion to dismiss the petition was heard, the subsequent determination by this court of the direct appeal from the judgment of conviction has now obviated any question which could be raised in that regard. The matters raised in the petition could have been raised in the appeal from the judgment of conviction, and, since that appeal has become final, those matters are barred by the doctrine of res judicata, although they may not have been barred for that reason at the time they were presented to the court in the post-conviction proceeding. Petitioner's further argument on appeal that the People may not stand on the second ground set forth in their written motion to dismiss the post-conviction petition, since they relied on their first ground of res judicata at the hearing is without merit.

The cases cited by petitioner in support of his position all involve general principles of law in the area of post-conviction proceedings, with which this court has no disagreement. See e.g., People v. Ashley, 34 Ill. 2d 402, 216 N.E. 2d

126; People v. Morris, 43 Ill. 2d 124, 251 N.E. 2d 202;
People v. Reeves, 412 Ill. 555, 107 N.E. 2d 861.

The remaining two points raised by petitioner are likewise without merit. It has never been questioned that a trial judge may consult his own notes made during the course of a trial in deciding, for example, a motion for a new trial, and there appears no good reason why he may not consult his trial notes in post-conviction proceedings. (See e.g., McChesney v. Davis, 86 Ill. App. 380, where a motion for a new trial was heard before a judge other than the one who presided over the trial.) The trial judge's notes are not matters dehors the record, as contended by defendant, and for that reason the cases cited by him in this regard are not in point. See People v. Wallenberg, 24 Ill. 2d 350, 181 N.E. 2d 143; People v. Rivers, 410 Ill. 410, 102 N.E. 2d 303; People v. Thunberg, 412 Ill. 565, 107 N.E. 2d 843.

With regard to petitioner's request that this court "shape a remedy" to deter improper dismissals of post-convictions petitions, he states that reversals of such dismissals by courts of review should not be accompanied by a remand of the case, but rather should be accompanied by an outright vacation of the conviction in order to deter prosecutors and trial judges from improperly proceeding in these matters. This rather extreme "remedy" which the court is requested to adopt defeats itself in its very suggestion.

For these reasons the judgment of the circuit court of Cook County sustaining the People's motion and dismissing the post-conviction petition is affirmed.

Judgment affirmed.

Publish abstract only.

Second Division, Judge Downing did not participate.

12 I.A.³ 891

PEOPLE OF THE STATE OF ILLINOIS,	)	ABST
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
ALEXANDRO MATA,	)	HON. F. EMMETT MORRISSEY,
	)	Judge Presiding.
Defendant-Appellant)	

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

Alexandro Mata, the defendant, was charged by an indictment with indecent liberties with a child. When the cause came on for trial on March 27, 1969, the defendant was represented by private counsel. He entered a plea of not guilty and waived trial by jury. At the close of the evidence, which consisted of the testimony of four persons, he was found guilty as charged, and the cause was continued until August 18, 1969, to allow defense counsel additional time to prepare for the pre-sentencing hearing. On August 18, the defendant withdrew his not guilty plea and entered a plea of guilty. After a hearing in mitigation the court sentenced him to not less than six nor more than twelve years in the penitentiary. No appeal was taken from this judgment.

Acting pro se the defendant filed a petition for relief under the Post-Conviction Hearing Act (Ill.Rev.Stat.1969, ch. 38, par.122-1 et seq.) After a hearing, at which the defendant was represented by the Public Defender, this petition was denied. The present appeal is taken from the court's denial of the petition for post-conviction relief. On March 27, 1973, the Public Defender filed a motion and brief in support thereof in this court pursuant to the holding in Anders v. California, 386 U.S.738, requesting leave to withdraw on the ground that an appeal would be without merit and could not possibly be successful. The Public Defender served a copy of his motion upon

the defendant prior to filing it. In addition, the defendant was notified of the motion by this court in a letter dated April 11, 1973. In the same letter we gave the defendant until May 15, 1973, to file any additional information in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and that if we found that the appeal was frivolous we would grant the Public Defender's motion and affirm the court's order without further appointment of counsel.

The defendant's post-conviction petition contained the following allegations:

1. That the defendant was inadvertently released from jail after being sentenced, allowed to go home, then summarily arrested and that because of this his mittimus had become invalid.

2. That there was no proper hearing in mitigation or prior to the court's acceptance of his guilty plea.

3. That his trial counsel was incompetent in not raising certain points in mitigation.

4. That he did not speak or understand English and was permitted to plea guilty without a proper admonition from the court or an understanding of the consequences of his plea.

The Post-Conviction Hearing Act provides that:

[a]ny person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under [the act]. (Ill.Rev.Stat. 1969, ch.38, par.122-1.)

It is well established that the purpose of the act is to provide an independent remedy to prisoners whose constitutional rights were violated and not to have claims considered which could have been considered on a direct review of the conviction. Proceedings under the act are limited to constitutional questions. (People v. Vail, 46 Ill.2d 589; People v. Fuca, 43 Ill.2d 182.)

Therefore the only claims properly raised in the defendant's petition are that his trial counsel was incompetent and that his plea of guilty was not knowingly and understandingly made. His claim that he was denied a hearing in mitigation of his sentence does not assert that he was denied a hearing altogether, but that his counsel did not raise sufficient arguments in the hearing that was held. This is essentially a part of the claim that his trial counsel was incompetent. After reviewing the record we conclude that these claims have no basis in fact.

At trial, the defendant was represented by private counsel of his own choice. When an accused is represented by counsel of his own choice, no constitutional question is raised unless the representation is of such a low caliber as to reduce the trial to a farce. (People v. Nischt, 23 Ill.2d 284; People v. Morris, 3 Ill.2d 437.) In the present case, the record is devoid of any facts which would call into question the competence of the defendant's counsel. In fact, the court noted that the counsel was one of known competence.

With respect to the hearing in mitigation, the record reveals that the proceeding was continued at the request of defendant's counsel for the express purpose of allowing him more time to investigate certain representations made by the

defendant. At the hearing, the defendant was represented by an associate of his trial counsel who was fully informed about the case and made numerous arguments and suggestions in mitigation of the sentence. In view of this the defendant's representation throughout the proceeding was more than adequate.

With respect to the plea of guilty, the defendant contends that he did not have a sufficient understanding of English language to be aware of what he was doing when he withdrew his original plea of not guilty and substituted a guilty plea in its stead. The record does not support such a claim. It is undisputed that the defendant had been in the United States since 1947. He had been convicted of a crime on at least one prior occasion and thus was not unfamiliar with courtroom procedure. After sentencing he carried on a conversation with the court in which he had no difficulty communicating. In any event, the guilty plea was entered after the court had already heard all of the evidence and had made a finding of guilty. Hence it could not have prejudiced the defendant's rights.

We have made a complete examination of the proceedings and have concluded that there is no merit in this appeal. The Public Defender's request for leave to withdraw as counsel for the defendant is granted and the judgment denying the defendant's petition for post-conviction relief is affirmed.

AFFIRMED.

ADESKO AND DIERINGER, JJ.,
CONCUR (abstract only)

12 I.A.³ 892

June 13/73



ABST.

58410

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
)	
vs.	)	CIRCUIT COURT OF
)	
JESSE P. PEREZ,	)	COOK COUNTY.
)	
Defendant-Appellant.	)	Hon. Philip Romiti
	)	Presiding.

MR. JUSTICE ADESKO delivered the opinion of the court:

Defendant, Jesse P. Perez, was charged with the offense of burglary. At his arraignment on May 14, 1969, he entered a plea of not guilty and the Public Defender was appointed to represent him. When the case came on for trial on June 26, 1969, defendant withdrew his not guilty plea and entered a plea of guilty. The court admitted defendant to 60 months probation, the first 60 days of which were to be served in the County Jail. The court considered the jail sentence as already served. The court set as one of the conditions of probation:

"That said defendant shall make a monthly report of his whereabouts, conduct and employment and furnish such other information relating to the conditions of his probation, as may from time to time be required by rule or order of court to the probation officer under whose charge said defendant shall be placed and shall appear in person before the court at such time as the court may direct ***."

On March 22, 1972, upon the recommendation of the probation department, an application for a warrant for probation violation was filed with the court stating that defendant had failed to report to his probation officer as required, and that he could not be located. The court granted the application. On May 9, 1972, the recommendation of the probation department was filed and a rule to show cause why probation should not be terminated was issued by the court.

On May 11, 1972, a hearing was held, at which defendant was present and was represented by the Public Defender. After hearing all of the evidence, the court ordered defendant's probation revoked, and sentenced him to serve one to three years in the Illinois State Penitentiary for his burglary conviction.

On June 9, 1972, defendant filed a notice of appeal, and the Public Defender was appointed as his counsel. The Public Defender now seeks to withdraw and has filed a brief in support of his motion pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 493, 87 S.Ct. 1396. He states that, from a review of the record, the only basis for an appeal would be whether defendant was denied procedural due process of law in his probation revocation hearing. The Public Defender concludes that the trial court adhered to the applicable law and that it did not abuse its discretion in revoking defendant's probation.

The Public Defender served a copy of his motion for leave to withdraw upon the defendant prior to filing with this court. In addition, defendant was notified of the motion by the court in a letter dated April 11, 1973. In that letter we gave defendant until May 15, 1973, to file any points he chose to support his appeal. We informed him that after such date we would make a full examination of all the proceedings and that if we found that the appeal was frivolous we would grant the Public Defender's motion. Defendant has failed to respond.

When an order admitting a defendant to probation is sought to be revoked, the general procedure to be followed is clearly set forth in the case of People v. Price, 24 Ill. App. 2d 364, 164 N.E. 2d 528, and the subsequent decisions of People v. Headrick, 54 Ill. App. 2d 44, 203 N.E. 2d 157; and People v. Dwyer, 57 Ill. App. 2d 343, 206 N.E. 2d 113, and Section 117-3 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 117-3). Defendant is entitled to a conscientious judicial

determination according to accepted and well recognized procedural methods upon the question of whether his probation conditions imposed have been violated. Defendant must be notified of the alleged violation of his probation and he must be given an opportunity to defend against and refute the violation.

Our examination of the record in the instant case discloses that defendant was properly informed of the facts of the probation violation, was present in court represented by counsel when evidence of his failure to report to his probation officer and of his absence from the jurisdiction in contravention of the terms of his probation was introduced, and had ample opportunity to defend against and refute alleged violations which he failed to do.

After examining the point raised by the Public Defender's brief as well as the entire record before this court, we are compelled to conclude that this appeal would be wholly frivolous and without merit. The motion of the Public Defender to withdraw from the instant appeal is therefore allowed and the judgment of the Circuit Court of Cook County is hereby affirmed.

JUDGMENT AFFIRMED.

BURMAN, P.J, and DIERINGER, J., concur.

(ABSTRACT ONLY)

55860

ABST

CLARENCE F. KERR,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of Cook County,
	)	Illinois, County Depart-
THE POLICE BOARD, CITY OF CHICAGO,	)	ment, Law Division.
FRANKLIN KREML, President and Member)	
of the Police Board; R. J. Hauser,)	
Secretary of the Police Board, and	)	Honorable
J.B.CONLISK, JR., Superintendent of	)	Edward J. Egan,
Police,	)	Trial Judge.
Defendants-Appellants.)	

PER CURIAM:

This is an appeal by the Police Board of the City of Chicago, Franklin Kreml, its President, R. J. Hauser, its Secretary, and James B. Conlisk, Jr., Superintendent of Police from a judgment of the Circuit Court of Cook County, revoking, in part, the Finding and Decision of the Police Board and ordering that Clarence F. Kerr be reinstated as a sergeant in the Department of Police of the City of Chicago as of May 1, 1970.

On April 14, 1970, James B. Conlisk, Jr., Superintendent of Police, filed charges against Clarence F. Kerr, plaintiff, rank of sergeant in the Department of Police of the City of Chicago and requested that the same be investigated by the Police Board.

Conlisk charged that plaintiff violated Rule 2 of the Rules of Conduct of the Rules and Regulations of the Chicago Police Department in that he brought discredit upon the Department of Police; that on November 13, 1969, he violated Rule 5,

"Failure to perform a duty", in that, having knowledge that one Helmuth Konrad had committed several traffic violations plaintiff did not take appropriate action to have Konrad charged with said violations; that he further violated Rule 5 in that plaintiff did not exercise his supervisory authority over Patrolman Frank Visco, his subordinate, to see that the proper reports and citations were made and issued regarding their investigation of an accident involving one Helmuth Konrad; that plaintiff violated Rule 21 "Failure to report to the Department any violation of the Rules and Regulations or any improper conduct", in that, though being present when Patrolman Frank Visco solicited a sum of money and accepted the sum of approximately \$300 from a Mrs. Konrad, plaintiff did not report said actions to the Department; and that plaintiff violated Rule 21 in that having knowledge that his subordinate did falsify an official report regarding an accident did not report said act to the Department.

A hearing on the charges was held before a member of the Police Board, on June 9, 1970.

The Police Board rendered its Finding and Decision on August 14, 1970 in which the Board found that the plaintiff was guilty of violating Rule 2 in that the conduct of plaintiff was not that which the Department expects from a reasonable, prudent and diligent and cautious officer; that plaintiff violated Rule 5 in that on November 16, 1969, having knowledge and information that one Helmuth Konrad had committed several traffic violations, he failed to take proper action to have Konrad charged with said violations; and that plaintiff was further guilty of violating Rule 5 in that on November 13, 1969, he failed to exercise his supervisory authority over Patrolman

Frank Visco, his subordinate, to oversee that the proper reports and citations were made and issued regarding their investigation of an accident involving one Helmuth Konrad.

The Police Board ordered that plaintiff be suspended from his position as a Sergeant in the Department of Police from May 1, 1970 to November 1, 1970.

The plaintiff filed a complaint for administrative review on August 25, 1970. The defendants filed their answer, with the complete record of proceedings had before the Police Board attached thereto, on September 30, 1970.

On November 23, 1970 the judgment order was entered. The trial court found that there was not sufficient substantial, competent evidence to support No. 6, failure to charge Konrad with traffic violations, and 7, failure to see that Patrolman Visco filed traffic charges against Konrad, of the Findings and Decision of the Police Board and that said Nos. 6 and 7 are contrary to the manifest weight of the evidence; that No. 5, plaintiff did not conduct himself as a reasonable, prudent, diligent and cautious officer, of the Findings and Decision of the Police Board is predicated upon Nos. 6 and 7 of said Findings and Decision and the said No. 5 is a repetition of Nos. 6 and 7. The trial court then ordered that Nos. 1 through 4 of the Findings and Decision of the Police Board [1. Plaintiff was a Sergeant of Police in the Chicago Police Department; 2. Charges were filed and served on plaintiff; 3. A hearing was held on the charges; 4. Plaintiff appeared in person and was represented by legal counsel of his own choosing.] be affirmed; that Nos. 5, 6 and 7 of the Findings and Decision be reversed; that the decision of the Police Board that cause exists for the suspension of Clarence F. Kerr as a Sergeant in the Police Department

and from the service of the City of Chicago for six months be reversed; that the order of the Police Board suspending Clarence F. Kerr from his position as a sergeant in the Police Department from May 1, 1970 to November 1, 1970 be reversed; and that Clarence F. Kerr be reinstated as a sergeant in the Police Department and in the service of the City of Chicago as of May 1, 1970.

The sole issue on appeal is whether the judgment of the trial court is contrary to the manifest weight of the evidence. Since the Police Board did not find the plaintiff guilty of violating Rule 21 (failure to report that Patrolman Frank Visco solicited and accepted a bribe), we will limit our opinion to a review of the record to determine whether the plaintiff was guilty of violating Rule 5, "Failure to perform a duty", in failing to charge Helmuth Konrad with traffic violations; and, whether he further violated Rule 5, in failing to exercise his supervisory authority over Patrolman Frank Visco, his subordinate, and to see that the proper report and citations were made and issued regarding the accident involving Helmuth Konrad.

The defendants argue that the record establishes that Helmuth Konrad committed several traffic violations; that Konrad, "a man unaccustomed to any beverages stronger than beer, who did not usually drink at all, downed six doubles of brandy in 3-1/2 hours, and then drove his automobile several miles, until his progress was impeded by his driving through the plate glass window of an automobile service station near his home and then, completely stopped, after several more miles of wild driving, this time with a broken leg, when he crashed through a garden

and into the side of a house". The defendants state that these events violated section 11-501 of the Illinois Vehicle Act (Ill.Rev.Stat., 1971, ch. 95-1/2, par. 11-501), which provides: "No person who is under the influence of intoxicating liquor may drive or be in actual physical control of any vehicle within this State."

Defendants' argument is based on the theory that Konrad was intoxicated and that the accidents were caused by his intoxication. In the early stages of the investigation the plaintiff reached the same conclusion. The plaintiff testified that he told Mr. Martin, the owner of the house which Konrad struck, that it was apparently a case of a driver running off the roadway and striking the building; that perhaps Mr. Konrad had fallen asleep; that they weren't sure; that they were going to issue a traffic citation for running off the roadway; and that he instructed Patrolman Visco to give the necessary court information to Mr. Martin, to write out his name, address, telephone number and insurance identification card, court date, charge, the time the case would be heard, and the room in which it would be heard. The plaintiff further testified that later he spoke to Konrad in the emergency room at Resurrection Hospital and Konrad said, "I got hit, I got hit." The plaintiff then spoke to Mrs. Konrad and her brother-in-law, Otto Bernsee, at the hospital and they told him that Konrad kept the car immaculate, there wasn't a scratch on it, it was always cleaned and polished; that Mrs. Konrad said that Mr. Konrad told her that he got hit; that if the trunk is open, that car is damaged and Konrad said he got hit. Plaintiff further testified that because of the statements

by Mr. Konrad, Mrs. Konrad and Otto Bernsee, they all went back to Rascher and Octavia and again examined the car. The plaintiff testified that when he arrived at Rascher and Octavia, Mrs. Konrad, Mr. Bernsee and Patrolman Visco had not as yet arrived; and that the plaintiff examined the car very closely with a flashlight; that "the front seat was busted backwards, it was on an angle like a 90 degree angle"; that "you couldn't drive the car in the position it was in"; that "on the back of the bumper there was a dent and above the bumper dent there was a dent on the mudguard"; and that "the trunk was all sprung out of shape". Mrs. Konrad said, after she arrived at Rascher and Octavia and had examined the automobile, "I told you there was damage on the car, that's where he got hit." After examining the automobile and discussing the matter with Patrolman Visco, out of the presence of Mrs. Konrad and Bernsee, the plaintiff instructed Patrolman Visco to make out a report that it was a two-car accident, with the other vehicle leaving the scene of the accident.

Ronald Hanzel, the manager of the Wellington Towing, Inc., testified that on November 18, 1969, he examined a white Chrysler owned by Mr. Konrad in his lot at 2532 N. Pulaski; that the front of the automobile was damaged; there was quite a bit of damage around the automobile and the back of the vehicle and the trunk was smashed in, dented.

Although Konrad testified that he had six double brandies in the tavern, there is no substantial evidence in the record which indicates that the plaintiff knew on November 13, 1969, or November 16, 1969, that Konrad was under the influence of intoxicating liquor or was violating any traffic regulations at the time he hit the Aamco station or at the time he ran off the roadway at Rascher and Octavia and hit the house owned by Martin.

The plaintiff testified that at the time he went over and talked to Konrad on the lawn, there was no odor of alcohol about Konrad.

John Janiszewski, a fireman assigned to Ambulance 20 on November 13, 1969, testified that he had occasion to respond to a call at the location at Rascher and Octavia; that he transported Konrad to the Resurrection Hospital and during the period of time he was transported to the hospital, Janiszewski was the driver of the ambulance; that Janiszewski was definitely close enough to "determine whether or not there was an odor of alcohol" on Konrad's breath; and that Janiszewski did not detect the odor of alcohol on Konrad's breath.

James Stewart, a Fire Department ambulance operator, testified that he had occasion to respond to a call to go to the scene of Rascher and Octavia on November 13, 1969; that he was close enough to Konrad to "determine whether or not he had an odor of alcoholic beverages upon his breath, because I picked him up off the ground and put him on the backboard"; and that Stewart did not "smell any odor of alcoholic beverages on his breath throughout the trip."

Although the findings of an administrative agency are deemed to be prima facie true and correct, and although the provisions of the Administrative Review Act have been construed to mean that courts are not authorized to reweigh evidence or to make an independent determination of facts, it is equally true that the findings of an administrative agency and the order predicated thereon must rest upon competent evidence and be

supported by substantial evidence. Harrison v. Civil Service Commission (1953), 1 Ill.2d 137, 115 N.E.2d 521; Menning v. Dept. of Registration (1958), 14 Ill.2d 553, 153 N.E.2d 52.

In Jordan v. Civil Service Com. (1972), 4 Ill.App.3d 741, 281 N.E.2d 687, the court said (4 Ill.App.3d, pp. 746-747):

"While it is well settled that findings of fact by an administrative agency are prima facie true and correct (Ill.Rev.Stat., 1969, ch. 110, par. 274) and that courts are not authorized to reweigh the evidence or to make an independent determination of facts (Parker v. The Department of Registration and Education, 5 Ill. 2d 288, 125 N.E.2d 494), a reviewing court is still not relieved of the important duty to examine evidence in an impartial manner and to set aside findings unsupported in fact. (Oakdale Community Consolidated School District No. 1 v. County of School Trustees of Randolph County, 12 Ill.2d 190, 195, 145 N.E.2d 736, 738; Wheeler v. County Board of School Trustees of Whiteside County, 62 Ill.App.2d 467, 477, 210 N.E.2d 609, 613-14.) The fact that an agency heard witnesses testify does not permit the blind approval of these findings by a court of review. (Drezner v. Civil Service Commission, 398 Ill. 219, 75 N.E.2d 303; Gasparas v. Leack, 93 Ill. App.2d 99, 235 N.E.2d 359.) Rather, findings of administrative agencies must be supported by substantial evidence, (Gibbs v. Orlandi, 27 Ill. 2d 368, 371, 189 N.E.2d 233, 235), and where it is found that the agency order is without substantial foundation in the evidence, it is the duty of a court of review to set it aside. Illinois Central R. R. v. Illinois Commerce Commission, 395 Ill. 303, 313, 70 N.E.2d 64, 69."

In light of the foregoing, it is apparent that the record in the case at bar does not rest upon sufficient, competent evidence and does not contain any substantial evidence to sustain the Finding and Decision of the Police Board.

Although the cases cited by the defendants correctly set forth the general law to the effect that in a civil service case the courts cannot reweigh the evidence, the cases are not

applicable to the facts in the case at bar where there is no substantial evidence to sustain the Finding and Decision of the Police Board.

The judgment of the trial court is affirmed.

Judgment Affirmed.

Third Division. Justices Dempsey, McNamara and Stamos participated.

121.A³.902

ABST

57294

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
JAMES CARTER, otherwise called	)	HON. EARL E. STRAYHORN,
JAMES HARRIS,	)	PRESIDING.
)	
Defendant-Appellant.)	

PER CURIAM:

James Carter, otherwise called James Harris, (defendant) was found guilty after a bench trial of the crime of robbery in violation of Section 18-1 of the Criminal Code, and was sentenced to a term of 4 to 8 years in the penitentiary. Ill.Rev.Stat. 1969, ch.38, par.18-1. On this appeal he contends that his guilt was not proven beyond a reasonable doubt, that the police employed improper and suggestive identification procedures, and that his sentence is excessive.

John Szumigala testified for the People that he was crossing the Jackson Boulevard bridge on his way to the Goodman Theater in Chicago about 8:00 p.m. on February 19, 1971, when the defendant, in the company of five other youths, knocked him to the ground and dragged him under the bridge, where he was beaten and robbed of his wallet, wristwatch, coat and rings. The witness testified that the lighting was good from the Art Institute floodlights and overhead bridge lights and that he observed the defendant for a period of ten to fifteen minutes. The witness was taken to a hospital for emergency treatment, where he later identified the defendant and one of the other youths, who were brought there by police, as his assailants; defendant was wearing the witness' coat and an officer had the witness' wristwatch which defendant had been wearing. The witness suffered severe injuries as a result of the beating and remained in the hospital for three days.

At a hearing on a motion to suppress evidence, Chicago Police Officer Nathaniel O'Malley testified that he received a description of two of the assailants and observed the defendant and another youth who matched the descriptions walking along Wabash Avenue in the Loop. The two youths were first taken to

be viewed by a person who had also allegedly been robbed and beaten a few minutes before, and were then taken to the hospital where they were identified by Szumigala. Defendant had been wearing Szumigala's coat and wristwatch.

Defendant's position at trial and at the hearing on the motion to suppress was that he was walking along Wabash Avenue when he was called over to a police van by the officer, told that he matched the description of a robbery suspect, and, along with another youth who was at the van, was placed under arrest and taken before two men for identification purposes. The defendant denied robbing or beating the complaining witness that night.

Defendant contends that he was not proven guilty beyond a reasonable doubt, arguing that the record fails to contain any testimony of Mr. Szumigala, but only the hearsay testimony of the arresting officer. Mr. Szumigala's testimony, as the State notes, was inadvertently omitted by the court reporter from the original record filed in this court, but has since been supplied by the State; however, references in the original record reveal that Mr. Szumigala did in fact testify at the trial. That testimony, as noted above, shows that defendant did beat and rob Mr. Szumigala, whereas defendant's evidence was that defendant did not beat and rob him. That conflict was for resolution by the trier of fact and the circumstances here do not warrant our setting aside that determination. People v. Fleming, 50 Ill.2d 141, 145, 277 N.E.2d 872.

As to defendant's contention that the police employed improper procedures in acquiring an identification, the police were confronted here with a situation where the suspects were arrested within minutes of the commission of the crime and in the vicinity, and the victim of the robbery had been taken to the hospital for emergency treatment for injuries received during the robbery. The show-up at the hospital was proper. People v. Young, 46 Ill.2d 82, 87, 263 N.E.2d 72. Furthermore, Mr. Szumigala's testimony shows that there was an independent basis for his in-court identification of the defendant, since

he had ample time and opportunity to observe his attacker during the incident. People v. Speck, 41 Ill.2d 177, 193, 242 N.E.2d 208.

Defendant lastly contends that his sentence is excessive in light of his young age and his past, non-violent criminal record. Defendant was on probation at the time of the commission of the instant crime. Further, the victim of the robbery was brutally beaten and severely injured during the robbery, all for no apparent reason. This court will not reduce a sentence unless it constitutes a clear departure from the spirit and purpose of the law, or is so excessive that it lacks proportion to the offense. People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673. The sentence imposed by the trial court under the circumstances of this case is not excessive nor does it constitute a departure from the spirit of the law.

For these reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Justice Schwartz did not participate.

6-17-43
Tollie
Gabinas



12 I.A.³ 903

ABST

56415

WILLIAM KAWITT,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	OF COOK COUNTY.
)	
v.)	
)	
BETH HAMIDRASH HACHODESH CEMETERY)	
ASSOCIATION, a cemetery association,	)	HONORABLE
	)	LESTER JANKOWSKI,
Defendant-Appellee.	)	PRESIDING.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

Plaintiff brought suit against defendant cemetery association for injuries allegedly sustained when he fell on a sidewalk located in a cemetery operated by the association. Plaintiff appeals from a directed verdict for defendant entered at the close of plaintiff's evidence.

On appeal plaintiff contends that: (1) the granting of the directed verdict was improper; (2) that the court erred in refusing to admit the testimony of an expert tendered by plaintiff; (3) the trial court erred in granting defendant a continuance; and (4) witness fees should have been granted to plaintiff for a continuance "unduly sought" by defendant.

Plaintiff alleged that he fell on a sidewalk in defendant's cemetery and that defendant had allowed the sidewalk to become pitted and gutted over a period of time and thus unsafe.

At trial plaintiff testified that on Sunday, December 17, 1967, he visited the cemetery of the defendant association. He further testified:

I was walking by the sidewalk there and it seemed like I stepped in a hole. It was covered with rocks and dirt and fell and my foot went out from under me and I fell.

He injured his right leg. Plaintiff called for help for about 25 or 30 minutes. No one came to his aid. Plaintiff crawled back to his car and drove home using his left foot. He saw his doctor the following day and was then hospitalized for four days. He

missed two or three weeks of work and when he finally returned to work, he could work only three or four hours a day due to his injured foot.

Plaintiff's counsel introduced photographs depicting the sidewalk on which plaintiff fell. Plaintiff was able to identify his Exhibit No. 3 as depicting the condition of the sidewalk when he fell. The photograph shows a portion of sidewalk with an uneven surface but no hole.

On direct examination plaintiff testified that it "seemed" like he stepped in a hole, but his testimony was equivocal. On cross-examination he testified that he did not see any hole. And at his deposition he stated that he fell because he stepped on a stone on the sidewalk.

Plaintiff called the president of the defendant cemetery association, Morris Sider, under Section 60 of the Civil Practice Act. He testified that he had been president of the association for about 20 years, and that he was familiar with the portion of sidewalk where plaintiff claimed he fell. He testified that there were no holes of any kind in the sidewalk. Plaintiff's counsel attempted to impeach the witness with the photograph of the sidewalk, plaintiff's Exhibit No. 3, but was unsuccessful. This concluded the plaintiff's case.

We believe that the trial court correctly directed a verdict for defendant at the close of plaintiff's case. Plaintiff's evidence was contradictory and inconclusive. Plaintiff never established notice of the defect on the part of defendant. The president of the cemetery association, Morris Sider, called under Section 60, testified that there was no hole or defect. Plaintiff, to the extent that Sider's testimony was uncontradicted and unrebutted, is bound by his testimony. Dimitrijevic v. Chicago Wesley Memorial Hosp., 92 Ill. App.2d 251, 236 N.E.2d 309, leave

to appeal denied 38 Ill.2d 629. Moreover, this is not a situation in which notice can be inferred on the basis of the nature of the defect or photographs of the defect. Tolman v. Wieboldt Stores, Inc., 38 Ill.2d 519, 233 N.E.2d 33. Plaintiff's testimony as to the nature of the defect was conflicting and unclear; the photograph is a close-up of a sidewalk but contains no background to establish its location, and there was no foundation as to when the photograph was taken. Therefore, notice cannot be supplied here from the defect itself. Hence, we believe that the test set forth in Pedrick v. Peoria & Eastern R.R. Co., 37 Ill.2d 494, 510, 229 N.E.2d 504, as applied to the facts in the case at bar, requires an affirmance of the directed verdict.

Plaintiff also asserts that the trial court should have admitted testimony of a "concrete expert" who would have testified that he made an inspection a year or two after plaintiff fell and that the defective sidewalk had been in poor condition for a period of 20 years thus putting the owners on notice as to its condition. The record indicates, however, that no offer of proof was made, and a proper motion was not put before the court. The expert's existence was raised only in a post-trial motion. Hence, the matter is not properly before this court, and we need not consider it.

Plaintiff also contends that the court erred in permitting defendant a continuance because the purpose of the continuance was to pursue further discovery. Further, plaintiff seeks witness fees incurred due to this continuance since his witnesses were at court on the day set for trial and had to return due to the continuance. Plaintiff made a motion for witness fees, which was denied, and he appeals from that order also.

The granting of a continuance is a matter that is solely within the discretion of the trial court. Plaintiff here had the burden of showing that the granting of the continuance amounted to

a manifest abuse of the trial court's discretion. Community Hosp. v. Industrial Com., 44 Ill.2d 119, 123, 254 N.E.2d 448. Nothing in the record suggests that the action of the trial court amounted to an abuse of its discretion, and we reject plaintiff's flat assertion that "no cause may be continued to permit further discovery." See Ill. Rev. Stat. 1969, ch. 110A, par. 201(f).

The issue of witness fees is not properly before this court because the point was not preserved for review. It is clear from the record that when the notice of appeal was filed, plaintiff's motion requesting witness fees had not yet been ruled upon. This is evident from the language of plaintiff's notice of appeal which states:

In the event that Plaintiff's Motion for Witness Fees is denied on July 8, 1971, Plaintiff also Prays that an Order be entered by the Appellate Court reversing that Order, and remanding for further proceedings not inconsistent with that Mandate.

After the trial court ruled on the motion requesting witness fees, plaintiff should have amended his notice of appeal as provided in Supreme Court Rule 303(c)(4). Ill. Rev. Stat. 1969, ch. 110A, par. 303(c)(4). Since this was never done, and the notice of appeal remained as above, the point has not been preserved for review.

The judgment of the circuit court is affirmed.

AFFIRMED.

English and Lorenz, JJ., concur.

Publish abstract only.



12 I.A.³ 904
ABST

No. 56520

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	_____
)	
FRANK CURRY (Impleaded),	)	HONORABLE
	)	PHILIP ROMITI
Petitioner-Appellant.	)	PRESIDING

PER CURIAM* (Fifth Division, First District):

Defendants Frank Curry and Freddie Clemmons were indicted for the armed robbery of Eddie Ford. (Ill. Rev. Stat. 1969, ch. 38, par. 18-2.) After a bench trial, each was found guilty of the lesser included offense of robbery (Ill. Rev. Stat. 1969, ch. 38, par. 18-1) and defendant Curry was sentenced to not less than two nor more than four years. Clemmons was sentenced to a term of six months and three years probation but did not appeal.

On appeal defendant Curry contends: (1) he was not proven guilty beyond a reasonable doubt because the testimony of the State's witnesses was discredited, was improbable and inconsistent with the physical evidence; and (2) the court should have accepted defendant's hypothesis of innocence since the evidence fairly permitted such an inference.

Four persons testified at the trial: Eddie D. Ford, police officers Richard Waszkiewicz and Richard Jablonski, and Freddie Clemmons.

Ford testified that before midnight, after having a few beers, he walked in the area of 47th Street and Indiana until about 1:00 A.M. on the morning of April 17, 1971, when he decided to get something to eat with a "crippled fellow" named Manuel. They entered a cab parked at the "L" station on 47th Street. Curry and Clemmons also got into the cab. At 48th and Vincennes, he was dragged out of the cab by either Curry or Clemmons, cut on the face, beaten up, and robbed of his watch

* Lorenz, J., took no part.

and coin purse. At trial Ford identified both defendants as his robbers.

The officers, Waszkiewicz and Jablonski, testified that they were on patrol, during their midnight shift, and came upon a disturbance at 435 East 49th Street at approximately 3:00 A.M. on April 17, 1971. They saw a man on the ground (Ford) with two men either standing or bending over him and Jablonski saw that both were kicking the man on the ground. At this time, Clemmons walked over to the squad car and said, "Everything's all right, officer." Then, Ford hollered, "Help, they just robbed me." They saw that Ford was bleeding from his face and proceeded to place Curry and Clemmons under arrest. A search produced a watch and coin purse from the pockets of Curry and a knife from Clemmons.

Recalled as a court witness, Ford testified that the knife taken from Clemmons by the police belonged to him (Ford).

Clemmons testified in his own behalf that while walking home with his brother-in-law, Frank Curry, they saw Ford lying on the ground. A closer observation revealed that Ford was hurt and cut on his face. Clemmons noticed the unmarked squad car approaching and flagged it down. He told the driver (Jablonski) that Ford was hurt and needed help. The officers proceeded to search him, and according to Clemmons they found a wallet, some papers, and poolroom chalk. The police then searched Frank Curry and placed on the hood of the squad car a knife and a coin purse that Clemmons said they had picked up off the ground. Curry did not testify.

Although Clemmons testified that he and Curry were trying to assist Ford when the police came, it was the testimony of the police officers that when they arrived Ford was on the ground with Curry and Clemmons bending or standing over him and one of them saw the feet of both hitting Ford's body. The

officers also testified they found Ford's wallet and coin purse in the pockets of Curry and that Ford had made a positive on the scene identification of Curry and Clemmons as the persons who robbed him.

After considering the testimony conflicts and discrepancies, the trial judge found that the evidence warranted a finding of guilty on the lesser charge of robbery. We agree.

It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, People v. Bracey (1970), 129 Ill.App.2d 57, 262 N.E.2d 748, and, unless it can be said that the court's judgment rests on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the trial court, even though evidence regarding material facts is conflicting and irreconcilable. People v. Brown (1969), 112 Ill.App.2d 414, 419, 420, 251 N.E.2d 337.

See also People v. Catlett (1971), 48 Ill.2d 56, 268 N.E.2d 378, where it was held that the finding of the trial court in a bench trial would not be disturbed although there were many discrepancies in the testimony.

From our examination of the record we do not believe the evidence is so improbable, unreasonable and unsatisfactory that we should disturb the finding of the trial judge who observed and listened to the witnesses. This conclusion rejects defendant's other contention that the evidence fairly permits an inference of innocence.

Accordingly, the judgment is affirmed.

AFFIRMED

(Publish abstract only)

121.A³ 904

72-174

UNITED STATES OF AMERICA

ABST

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 4th day of December, in the year of our Lord
one thousand nine hundred and seventy-two, within and for the
Second District of Illinois:

Present -- HONORABLE WILLIAM L. GUILD, Presiding Justice
HONORABLE GLENN K. SEIDENFELD, Justice
HONORABLE JAY J. ALLOY, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 27, 1973 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
JUN 27 1973
LOREN J. STROIZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the 18th
	)	Judicial Circuit,
-vs-	)	Du Page County
)	
CHARLES H. GATHMAN,	)	Hon. Marvin E. Johnson
	)	Judge presiding
Defendant-Appellant.)	

PRESIDING JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The defendant was separately charged with driving under the influence of alcohol and driving with license revoked on November 12, 1970. The two cases were consolidated for trial by agreement before the court, without a jury, and the defendant was found guilty of both offenses. The court imposed a fine of \$1,000 for each offense and sentenced him to one year in Vandalia for each offense, the two sentences to be served concurrently. From this judgment the defendant appeals.

Ray Cihock was walking his dog and saw the defendant driving down a residential gravel street in Bensenville at a very slow rate of speed. The defendant stopped his car in front of the Cihock driveway and slumped over the wheel. Cihock attempted to arouse him, was unable to do so, and then called the Du Page County Sheriff's office. Officers Palmer and Ohlson came to the scene and after some difficulty were able to arouse the defendant. They assisted him from the car and walked him back to their squad car. Both officers smelled the odor of alcohol emanating from the

car and defendant was unable to walk alone. At the Sheriff's office various physical tests for intoxication were given to the defendant and he was found to be unsteady and unsure on the test, was unable to do the finger to nose test, his clothes were messed, his eyes were red, and his pupils were dilated. In the opinion of both deputies the defendant was under the influence of intoxicating liquor.

Defendant testified in his own behalf. He said he had worked all night as a cook at a restaurant in Northbrook, Illinois; that he had taken a friend home to Bensenville and was on his way to Rosemont, Illinois, when he drove off the road and fell asleep because of exhaustion. He further testified that his friend in Bensenville asked him in at 8:30 A.M. to sleep but he stated he had to be at work at 11:00 o'clock so he had to get home to get some sleep. In the opinion of this court the evidence of the disinterested witness Cihock and the two police officers indicated intoxication, and defendant was found guilty beyond a reasonable doubt of the offense of driving while under the influence of intoxicating liquor. This court will not substitute its judgment for that of the trial court in this regard.

We turn then to the offense of driving with license revoked. During the course of the trial and at the conclusion of the first witness's testimony, the State introduced the driving record of the defendant over the objection of counsel. This record indicated at the top thereof that the defendant had no valid driver's license on the date of the offense herein, to-wit: November 12, 1970. However, the record itself contained thirty-five entries and from an examination of the face thereof it would appear that his driver's license had been suspended or revoked several times.

The defendant contends that People v. Archibald (1972), 3 Ill.App.3d 591, 279 N.E.2d 84, is controlling in this regard. In Archibald the defendant's driving record was introduced which contained evidence of other offenses which had been obliterated. The reviewing court held that introduction of this record was prejudicial as the jury could not help but be influenced by the number of obliterated items. However, Archibald was a jury case; the case before us was tried by the court.

A different principle applies in a bench trial with relation to the admission of evidence. On such a trial without a jury the judge, as the trier of the facts, is presumed to have considered only such evidence as is competent. This has been the rule in Illinois for many years, both in civil and criminal cases heard without a jury. In Merchants Dispatch Trans. Co. v. Joesting (1878), 89 Ill. 152, 155, which was a bench trial, the court there stated: "We will not presume the court, when trying a case, ever considers immaterial or improper evidence in reaching a decision." Likewise in People v. Link (1935), 282 Ill.App. 520, a criminal case tried by the court without a jury, the court cited Radtke v. People (1912), 171 Ill.App. 462, with approval which states as follows:

"We know of no rule of law that a court, on a hearing without a jury, is required to consider, in the determination of the issues, immaterial and incompetent evidence, however the same may have been admitted in the case. On the contrary the rule is that, on a trial by the court without a jury, no improper or incompetent evidence will be presumed by a reviewing court to have influenced the court in reaching a decision, where there is sufficient proper evidence to justify the judgment. (citations) There are also many Appellate Court decisions to the same effect." 171 Ill.App. at 464-465.

We adhere to that ruling and find that there is no question but that the defendant was properly found guilty of driving while his license was revoked.

The judgments of the trial court are affirmed.

Affirmed.

SEIDENFELD, J., and ALLOY, J., concur.

CHICAGO EAR

ABST

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

PRESIDING.

The Rule to Show Cause was based upon the fact that defendant had failed to report to his probation officer and that he had been arrested and charged with another robbery, which case had been stricken with leave to reinstate on March 27, 1972. At the hearing on the Rule to Show Cause, Probation Officer James Reed started to testify as to the facts surrounding defendant's arrest on the recent robbery charge. The defense objected on the ground of hearsay. The Assistant State's Attorney informed the court that because the complaining witness was now deceased, the testimony of the investigating police officer was being offered concerning his conversations with the deceased. The trial court ruled this testimony inadmissible and struck the

* DRUCKER, J., took no part.

paragraphs of the Rule to Show Cause pertaining to the defendant's arrest on the charge of robbery.

James Anderson, an adult probation department officer, testified that after defendant had been placed on probation in August, 1970, the case was assigned to him. He produced the records of defendant's probation which had been kept in the ordinary course of his employment. He further testified that defendant had not reported to him since May 5, 1971 (more than ten months). He had attempted to locate defendant at his last-known address on three or four occasions without success.

Defendant testified that when he was placed on probation, he lived and worked at 839 E. 43rd Street, Chicago. He admitted that he had not reported to his probation officer since May 5, 1971. He stated that the reason for his failure to report was that his father had suffered a heart attack and he had the responsibility of seeing to his father's business while his father was hospitalized and later while recuperating at home until the date of his arrest on November 16, 1971.

The Public Defender was appointed to represent defendant on appeal. He has now filed a motion for leave to withdraw, accompanied by a brief in support thereof pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396. Copies of the motion and brief were mailed to defendant on February 26, 1973, and he was advised that he had until April 30, 1973, to file any additional points he might choose in support of his appeal. Defendant has not responded.

The Public Defender's motion to withdraw states that after reviewing the entire record, it was his belief that the only possible basis for an appeal would be whether the evidence sufficiently established that defendant had violated the terms

of his probation, i.e., that he had failed to report to his probation officer. In People v. Henderson, 2 Ill.App.3d 401, 276 N.E.2d 372, this court, in considering a similar contention, said:

The petition for revocation of probation charged that defendant had failed to report to his probation officer and that he had moved and could not be located. Counsel for defendant in effect admitted this to the trial court, stated that he had spoken to defendant about it, and attempted to justify the violation with the vague excuse that defendant was hospitalized "in August". This contention cannot justify defendant's failure to report from December, 1968, when he was admitted to probation, to the date of the hearing, either before or after his period of hospitalization. Under these circumstances, and on this ground alone, the court acted well within the bounds of reasonable discretion in revoking the probation.

At a revocation of probation proceeding, the fact that the defendant violated the conditions of his probation must be proven by a preponderance of the evidence. People v. Crowell, 53 Ill.2d 447, 292 N.E. 721. In the case at bar, there was sufficient evidence from which the trial court could find that defendant had violated the terms of his probation. The order granting the defendant's probation clearly sets forth that he shall make a monthly report of his whereabouts. See also Ill.Rev.Stat. 1969, ch. 38, par. 117-2(a)(3). The defendant was aware of his obligation to report monthly, as evidenced by the fact that he had reported to the probation department for the first nine months of his probation. Probation Officer James Anderson testified that the defendant's case was assigned to him and that defendant had not reported to him since May 5, 1971. Defendant's own testimony fully corroborated this statement. Under these circumstances, the trial court acted well within the bounds of reasonable discretion in revoking defendant's probation.

After a full examination of the record and of all of the proceedings in accordance with the dictates of Anders, we conclude, in agreement with the opinion of the Public Defender, that there

are no points "arguable on their merits" and that this appeal is "wholly frivolous."

Defense counsel is given leave to withdraw, and defendant's conviction is affirmed.

A F F I R M E D.

(Publish abstract only.)



12 I.A.³ 959

No. 57931

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE	
	)	CIRCUIT COURT OF	
Plaintiff-Appellee,	)	COOK COUNTY	ABST
)		
vs.)	_____	
)		
RONALD A. LOWE,	)	HONORABLE	
	)	LAWRENCE I. GENESEN	
Defendant-Appellant.	)	PRESIDING	

PER CURIAM* (Fifth Division, First District):

Defendant Ronald A. Lowe was charged with battery (Ill. Rev. Stat. 1971, ch. 38, par. 12-3) and after a bench trial was found guilty and sentenced to six months in the House of Correction.

Defendant's sole contention on appeal is that there existed a fatal variance between the charges made in the complaint and the proof adduced at trial. He argues that the complaint, which stated that defendant "knowingly, without legal justification grabbed Miss Elisa Haywood by the neck, and dragged her into a gangway, causing bodily harm, scratches and bruises around the neck of Miss Elisa Haywood" and which further stated that the above actions were "in violation of Chapter 38, Section 12-3 Illinois Revised Statute * * *" limited the charge against the defendant to that of one particular definition of battery, namely causing bodily harm to an individual (see ch. 38, sec. 12-3a(1)) and excluded the alternative definition of the offense of battery, namely that of making physical contact of an insulting or provoking nature with an individual (see ch. 38, sec. 12-3a(2)).

Defendant then contends that insufficient evidence of bodily harm was adduced at trial and since he was not charged with making contact of an insulting or provoking nature, his battery conviction must be reversed.

Complainant testified that while she was walking down the street alone at about 10:30 P.M. the defendant crossed over to her side of the street and staggered in front of her, putting

*LORENZ, J., took no part.

some gloves on. The next thing she knew "he had his hands around my throat, choking me and dragging me in the vestibule towards a gangway towards the alley." The defendant testified that he encountered the complainant and asked her if she would like to come to his house and that she mumbled something and shook her head at which time defendant attempted to put his arms around her but she pushed him and he just pushed back, then she pushed him away and screamed and he said "okay, I am sorry" and started to walk away. No other eyewitness testimony was presented at trial and it is unnecessary to recount any further trial testimony for the purposes of this appeal.

OPINION

Defendant argues that there was no proof of bodily harm and that therefore there was a variance between the complaint and the proof because the complaint did not specifically designate (other than a reference to the battery statute itself) any act or acts of physical contact of an insulting or provoking nature. We note the complaint described the alleged offensive conduct of the defendant and further stated that said conduct was in violation of "Chapter 38, Section 12-3 Illinois Revised Statutes * * *." We believe the language of the complaint was sufficiently explicit for the defendant to fully understand the nature and elements of the charge against him. See People v. Bowman (1971), 132 Ill.App.2d 744, 746, 270 N.E.2d 285, where it was said:

The complaints stated the offense alleged to have been committed, cited the criminal statute which the defendants were accused of violating, and charged that the statute was violated due to the defendants striking the complainant about the head and body. The variance between the language of the complaints and that of the statute is inconsequential. Striking the complainant "about the head and body," described with specificity the "physical contact of an insulting or provoking nature" prohibited by the statute. The complaints informed the defendants with reasonable certainty of the charge against them and were sufficient to charge the offense of battery.

Under the authority of Bowman, we hold that it is inconsequential that the complaint did not, in addition to describing the defendant's alleged conduct and citing the specific criminal statute involved, mention the words "insulting or provoking nature" in describing the defendant's alleged physical contact with the complainant.

We also hold that defendant's contention that there was an insufficient showing of bodily harm is without merit. It is fundamental that matters of credibility of witnesses and weight to be given their testimony is within the province of the trial court and its judgment will not be set aside by the reviewing court unless proof of guilt is so unsatisfactory as to create a reasonable doubt as to defendant's guilt. People v. Pagan (1972), 52 Ill.2d 525, 288 N.E.2d 102.

From our examination of the record we do not believe that it was unreasonable for the trial judge to have accepted the testimony of the complaining witness over that of the defendant. And, in doing so, it was reasonable for him to find that defendant's conduct, as testified to by her, constituted an intentional, legally unjustified causing of bodily harm as required under Chapter 38, Section 12-3a(1). There is no requirement that evidence be adduced concerning a visible injury such as bruising, scratching or bleeding. It is sufficient that bodily harm was inflicted. (People v. Gant (1970), 121 Ill.App.2d 222, 257 N.E.2d 181.) We believe that testimony of choking and dragging under the circumstances testified to by the complaining witness is sufficient evidence of bodily harm to justify the court's findings. Defendant relies on People v. Wright (1966), 75 Ill.App.2d 290, 221 N.E.2d 159, which reversed a conviction of battery on the ground that there was no proof of bodily harm. In that case a police officer charged that while making an arrest of Mr. Wright, Mrs. Wright "started hitting me, and started kicking * * *." There was other evidence that the

police officer "knocked her down--kicked her in the shins." Her conviction for resisting a peace officer was affirmed.

We believe Wright presents a factual picture substantially different from that in this case where the complaining witness was choked and dragged.

The judgment is affirmed.

AFFIRMED

12 I.A.³ 974

57621

ABST

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
ANTHONY W. LUSTER,	)	Hon. Marvin E. Aspen,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Anthony W. Luster (defendant) was charged with unlawful use of a weapon in carrying a revolver concealed on his person. (Ill.Rev.Stat. 1969, ch.38, par.24-1(a)(4).) After a bench trial, he was found guilty and sentenced to serve 60 days in the House of Correction. He appeals.

The single point raised by defendant in this court is that there is an absence of proof of the actual concealment of the firearm by him. On the contrary, the State urges that the element of concealment was proved beyond reasonable doubt and that the trial court acted correctly in determining the credibility of the witnesses.

The court heard the testimony of two police officers and of defendant. The two officers were driving in an unmarked police vehicle in a northerly direction in a public alley in Chicago. It was approximately 11:30 p.m. and the area was well lighted. When their automobile had traversed some 100 feet into the alley, they noted the defendant walking toward their car. He was then 30 to 40 feet away. The lights on their car were on and there were alley lights some five feet away.

One officer testified that the defendant looked at them as they approached. He then took a nickel-plated revolver

from his right pocket and tossed it into a gangway to the east. Defendant was wearing a jacket with slashed pockets. The officers stopped their car and took defendant into custody. The second officer entered the gangway and retrieved the revolver.

The first officer testified that he saw defendant take the gun out from his right pocket. The defendant had nothing in his hand while he was walking but he reached into his right-hand pocket and removed the gun. He stated that the gun was not protruding from the pocket but that he could not tell exactly whether it was fully in the pocket or partially therein before it was removed by the defendant and thrown aside. This police officer conceded that he had made a report of the incident in which he simply stated that he saw the defendant throw the revolver into a yard. He also testified before the grand jury that when he saw defendant, "***he was taking a chrome-plated object which resembled a revolver and tossed it into a gangway." The officer stated, however, that he told the grand jury what he saw and that he saw defendant take the gun out from his right pocket although he was not asked about the pocket before the grand jury.

The second officer was driving the automobile. The first police officer indicated defendant and told him that defendant had just pulled out a gun and stepped into the gangway. He stopped the car, ran over to the gangway and saw a silvery object being thrown to the ground. He recovered the revolver. He stated that when he first saw the gun it was leaving defendant's hand.

Defendant testified in his own behalf that he was standing in the gangway leaning on the wall when he first saw the police officers. He was coming from a poolroom and was going

to get his automobile. When the police came and accosted him, he had no revolver in his pocket; he threw nothing into the gangway; he did not see the officer recover the gun and when they showed him the gun he told them he did not know where it came from.

There are two lines of decided cases in connection with situations of this type. The most frequently cited decision is People v. Euctice, 371 Ill. 159, 20 N.E.2d 83. In that case, defendants were riding in the rear seat of an automobile. They were stopped by the police. An officer saw one defendant drop a pistol, which was held between his legs, to the floor of the car. Another pistol was lying on the floor and the second defendant attempted to kick it under the rear seat. The Supreme Court affirmed conviction of the defendants for the crime then referred to as carrying concealed weapons. The pertinent language used by the Supreme Court has since been repeated many times. The court held (371 Ill. at 162):

"The statute does not mean that the firearm shall be carried in such manner as to give absolutely no notice of its presence. It merely requires that the firearm shall be concealed from ordinary observation. In this case the court was warranted in finding defendants had been concealing their guns on or about their persons, and that, by dropping them to the floor and kicking them under the rear seat, they were further endeavoring to conceal them."

An example of a recent decision by this court citing and depending upon Euctice, is People v. Latson, 5 Ill.App.3d 1100, 284 N.E.2d 436. Latson involved a rather similar situation concerning alleged carrying of concealed weapons in an automobile. This court applied the Euctice test as to whether the weapons were "concealed from ordinary observation."

We regard these cases and the authorities which they cite as decisive in the situation at bar. It was the duty of the trial court as the trier of fact to determine the credibility of the witnesses. The testimony of a police officer is that the pistol was carried by defendant and that it was concealed from ordinary observation. The law did not require that the weapon be concealed from him in such manner as to give absolutely no notice of its presence. Defendant's own testimony does not support the present theory of his counsel which is simply that there is a lack of proof regarding actual concealment. Defendant totally denied the testimony of both officers and denied that he ever had or discarded the gun. In a situation of this type, the determination of the credibility of these witnesses was a matter for decision and determination by the trial judge. We can disturb his findings "***only where the evidence is so unreasonable, improbable and unsatisfactory as to leave a reasonable doubt as to defendant's guilt." People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378.

Counsel for defendant urges upon us the application here of the other line of cases involving situations in which all the evidence shows that defendant was actually in possession of a weapon which was openly displayed and readily visible. In People v. Crachy, 131 Ill.App.2d 402, 268 N.E.2d 467, the testimony was that an officer saw defendant some 15 to 30 feet away with an automatic pistol tucked into the waistband of his trousers. The gun was readily identified as a pistol. This court differentiated Euctice and similar cases on the ground that (131 Ill. App.2d at 403):

"In each case the evidence indicated an actual covering or obstructing of the weapon in such a manner as to at least make difficult its recognition as a firearm."

Quite similarly, in People v. Davis, 1 Ill.App.3d 1078, 275 N.E.2d 713, the police observed defendant carrying a shotgun. Conviction under the same statute as involved in the case at bar was reversed. The court cited from Euctice and differentiated it with the statement that, "In the case at bar the weapons were never concealed from ordinary observation." 1 Ill. App.3d at 1079.

In the instant case, the trial court acted properly in applying the Euctice test and in concluding from all of the evidence here that the firearm was concealed from ordinary observation before defendant tossed it into the gangway. It must be recognized that the entire incident was over in a second or two or perhaps even less. The testimony is beyond reasonable doubt in supporting the result reached.

Judgment affirmed.

BURKE, P.J., and HALLETT, J. concur.



12 I.A.³ 1036

57066

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE ABST
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
ROBERT EVANS,	)	HONORABLE
	)	MINOR K. WILSON.
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE HAYES delivered the opinion of the court:

On 20 November 1968 in Indictment No. 68-3985, Robert Evans (hereinafter defendant) was charged with the offense of theft of property having a value in excess of \$150.00 from the person of the complaining witness (a special police officer for the Chicago Transit Authority) on 18 November 1968, by picking his pocket. At a bench trial on 14 April 1970 on a plea of not guilty, defendant was found guilty and was sentenced to a term of not less than five years nor more than ten years. Under the then current law, the statutorily authorized sentence for this offense was imprisonment in the Illinois State Penitentiary for up to ten years. Ill. Rev. Stat. 1969, ch. 38, sec. 16-1.

The sole issue presented in this appeal is whether the minimum sentence of five years is excessive in that it unduly defers defendant's initial eligibility for parole and thereby improperly interferes with the exercise by the State correctional authorities of their discretion in determining defendant's parole eligibility. Defendant asks that, under the power vested in us by Supreme Court Rule 615 (Ill. Rev. Stat. 1971, ch. 110(3), sec. 615(b)(4), we reduce the minimum sentence of five years in order that defendant may sooner become initially eligible for parole.

Under the law in 1970, initial eligibility for parole was determined by deducting "good time" credit (as established

by the Department of Corrections) from the minimum term of the indeterminate sentence actually imposed (Ill. Rev. Stat. 1969, ch. 38, sec. 123-2(a)(2)). Under that formula and assuming that this defendant earns the maximum authorized "good time" credit, defendant would become initially eligible for parole in three years and nine months. (This computation was furnished to us in defendant's brief.)

At the post-trial hearing in aggravation and mitigation, the State, in aggravation, established that defendant had previously been convicted of larceny or theft six times. Four of the convictions were misdemeanors, and two were felonies. In addition, the record also established that defendant had been a parole violator.

In mitigation, defendant established that, since his last release from the Penitentiary, he had been steadily employed up to the time of his arrest for the instant offense (a period of roughly 14 months).

Defendant's sole issue on this appeal has been affected (if not indeed effected) by the new Unified Code of Corrections. Ill. Rev. Stat. 1972 Supplement, ch. 38, sec. 1001-1-1 et seq., effective 1 January 1973 (sec. 1008-6-1). Section 1008-2-4 of the Code provides, in pertinent part, as follows:

"If the offense being prosecuted has not reached . . . a final adjudication, then for purposes of sentencing, the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced."

Since defendant's appeal was pending on 1 January 1973, his prosecution had not reached a final adjudication. People v. Harvey (1973), ___ Ill.2d ___, 294 N.E.2d 269. Hence, for purposes of sentencing, the sentences under the new Code apply "if they are less than under the prior law upon which the prosecution was commenced".

Under the Code, a theft of property from the person or exceeding \$150.00 in value is a Class 3 felony. Ill. Rev. Stat. 1972 Supplement, ch. 38, sec. 16-1(e)(2). The maximum term of imprisonment for a Class 3 felony is any term in excess of one year not exceeding ten years. Ill. Rev. Stat. 1972 Supplement, ch. 38, sec. 1005-8-1(b)(4). Hence, the maximum term is the same as under the prior law. But the minimum term of imprisonment for a Class 3 felony is one year "unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term which shall not be greater than one-third of the maximum term set in that case by the court". Ill. Rev. Stat. 1972 Supplement, ch. 38, sec. 1005-8-1(c)(4).

The maximum term actually imposed by the court in the instant case was ten years. The minimum term was five years which is in excess of one-third of the maximum. Hence, defendant cannot receive a higher minimum term than three years and four months. And his initial eligibility for parole will still be determined by deducting "good time" credit from the new minimum term. Ill. Rev. Stat. 1972 Supplement, ch. 38, sec. 1003-3-3(c).

We do not regard the highest minimum term under the new Code as excessive in this case, having regard to the nature of the offense of which defendant was convicted and to the testimony adduced at the hearing in aggravation and mitigation. People v. Winfield (1971), ___ Ill.App.2d ___, 272 N.E.2d 848; People v. Brown (1965), 60 Ill.App.2d 447, 208 N.E.2d 629; People v. Wallace (1969), 117 Ill.App.2d 426, 254 N.E.2d 643.

Therefore, we affirm the conviction, and, in accordance with the Unified Code of Corrections, we modify the sentence and, as modified, the minimum sentence shall be not less than three years and four months and the maximum shall be not more than ten

57066

years. The circuit court of Cook County is directed to issue a corrected mittimus in conformance with this order.

AFFIRMED, AND REMANDED
WITH DIRECTIONS.

LEIGHTON, J., and SCHWARTZ, J., concur.



12 I.A.³ 1037

No. 56964

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

RUSSELL SPRATT,
Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY.

ABS

) HONORABLE
) DANIEL J. WHITE,
) PRESIDING.

MR. JUSTICE MCGLOON delivered the opinion of the court:

Defendant, Russell Spratt, and his codefendant, Wydell Johnson, were each charged by complaint with theft (Ill.Rev.Stat. 1971, ch.38, par.16-1) and battery (Ill.Rev.Stat. 1971, ch.38, par. 12-3). They were tried jointly in the circuit court of Cook County without a jury. Both were found guilty as charged, and Spratt was sentenced to the House of Correction for a term of nine months for theft and a term of six months for battery, the sentences to run concurrently. He appeals.

He presents two issues: 1) Whether he was proved guilty beyond a reasonable doubt, and 2) Whether the conviction for battery must be reversed because it arose out of the same transaction constituting his conviction for theft.

We affirm as modified.

The complainant, Bishop Reese, testified at trial that on the night of October 16, 1971, he was walking across a vacant lot on his way home, which was at 553 East 47th Street in Chicago, when he was attacked by two young men who came upon him from behind and whom he later identified at trial as the defendants. He testified that they hit him on the head with a stick, knocked him down, and went through his trouser pockets. They stole six dollars, his watch and his wallet with his credentials inside. Before the incident while he was crossing the vacant lot, he noticed some teenagers sitting on the steps of a nearby building on the corner, two of whom he later testified were the defendants.

On cross-examination Reese testified that although it was dark and there were no lights in the vacant lot, he saw the

defendants' faces, the leather jackets they were wearing, and what he described as a white rag or bandage around the head of one of the men. He testified that he got a good look at their faces while he was lying on the ground. He did not observe if one or both of the men knocked him down, but he did see both defendants when they were going through his pockets. He further testified that he saw two other people in the vacant lot during the attack who had come near him. As he was lying on the ground, the complainant saw one defendant going through his right-hand trouser pockets and the other defendant going through his left-hand trouser pockets, but he was not certain which defendant was on his right side and which defendant was on his left side. The complainant did not actually see Spratt take anything from him. On redirect examination, Reese clarified his previous testimony that he had never seen the defendants before the incident, but that he learned their names from the statement of a police officer and from the proceedings in court.

James Robinson, a Chicago police officer who investigated the crime, testified that when he arrived at the scene, Reese was still on the ground, and that when he first observed the defendants they were in the same general area together, about one-half block from Reese. Officer Robinson also saw three other people, two men and a woman, approximately fifteen feet from Reese. Officer Robinson saw Johnson running alone, chased him, and apprehended him. Robinson's partner, another police officer, chased Spratt and apprehended him. Robinson saw his partner return with a wallet which the complainant identified at the scene as his stolen wallet. The six dollars and the watch were not recovered.

Johnson denied committing the two offenses. He testified that he and Spratt were sitting on the porch of the house with a girl when they heard some screams; that he saw two girls and a boy attacking the complainant in the middle of the street; that he and the girl who had taken Reese's wallet were running together from the scene when he was apprehended by a police officer; and that he told the officer where the wallet was located because he saw the

girl throw it away as they were running.

Spratt testified that only he and Johnson were standing on the steps when they saw the complainant walk by; that he saw the complainant go around the corner, and a few moments later he heard screams; that he saw a small group of people around the complainant in the middle of the street, but he did not know where they came from; and that he was not running when the police apprehended him. He denied hitting the complainant or taking anything from him.

Defendant's appointed counsel, Mr. Goldberg, testified that he had a conversation with the complainant in his office before trial. The complainant, when asked if he could identify the defendants by their faces, responded that he could not, but that he felt that Johnson's possession of the wallet implicated him in the crimes.

Defendant argues that he was not proved guilty beyond a reasonable doubt because the complaining witness had an inadequate opportunity to observe his assailants; because the crime occurred at night in a vacant lot which had no lights; because the record discloses that the in-court identification of the defendant was based upon what the complainant was told by a police officer and not what he actually viewed at the time of the occurrence; and because the identification was based upon the type of jacket worn by the defendant and not upon a view of the assailants' faces.

"The sufficiency of an identification raises a question of the credibility of the witnesses which is a matter for the determination of the trier of facts, and his judgment will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt." (People v. Cooper (1971), 270 N.E.2d 447, 448.) "[W]here the identification of the accused is at issue, the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and he viewed the accused under such circumstances as would permit

a positive identification to be made." Peorie v. Stringer (1972), 52 Ill.2d 564, 569, 289 N.E.2d 631, 634.

In the instant case, the complainant's identification was positive. At the trial, which was two days after the occurrence, the complainant identified the defendants. The complainant explicitly stated that he saw their faces. His testimony that the defendants were wearing leather jackets and one had a white bandage or cloth around his head was uncontradicted. Officer Robinson testified that the complainant positively identified both defendants before trial. Both defendants were arrested near the vacant lot. Robinson and Johnson testified that they saw Spratt running from the scene after the theft had taken place.

Defendant points to parts of the trial testimony and alleges that the complainant was confused about the identity of his assailants. In his brief, defendant states that during the trial, the man whom the complainant identified as Spratt was really Johnson, and the man whom he identified as Johnson was really Spratt. The trial testimony is not clear as to whether, in fact, such a mistake was made. The uncertainty that does appear in the complainant's testimony as to which defendant was on either side of him while he was on the ground and as to where his wallet was found only shows that he was confused about the defendants' names, and does not detract from his positive identification of the two men as his assailants. Defense attorney's testimony which related his conversation with the complainant before the trial goes to the complainant's credibility and the weight to be given to his testimony, and were matters for the determination of the trier of fact, which, in the instant case, was the trial court. We find that the record adequately supports the findings of the trial court. The cases cited by the defendant on the question of the credibility of identification testimony are inapposite on their facts from the instant case. See, e.g., People v. Fiorita (1930), 339 Ill. 78, 170 N.E. 690; People v. Cullotta (1965), 32 Ill.2d 502, 207 N.E.2d 444.

Defendant's second contention is that his conviction for battery must be reversed, because it arose out of the same transaction constituting his conviction for theft. Defendant's argument goes too far. Only one sentence can be imposed when different offenses arise from the same conduct. (People v. Smith (1972), 8 Ill.App.3d 270, 290 N.E.2d 261.) But two convictions, in and of themselves, which are based on the same conduct, do not violate due process, and are proper. (People v. Perry (1971), 47 Ill.2d 402, 266 N.E.2d 330.) In the instant case Spratt and his codefendant knocked the complainant to the ground in order to steal his wallet, money and watch. Under these circumstances, it was improper for the trial court to impose sentence on the battery conviction. People v. Redding (1973), Ill. App. Ct. No. 56656.

The judgment of conviction and sentence for theft are affirmed. The judgment for battery is modified and the sentence vacated.

Judgment affirmed as modified.

Schwartz and McNamara, JJ., concur.

No. 57281

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 C. B. CALDWELL,)
)
 Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY 'ABST

HONORABLE
NATHAN COHEN,
PRESIDING.

PER CURIAM* (Fifth Division, First District):

Petitioner appeals from an order dismissing his pro se post-conviction petition without an evidentiary hearing, filed pursuant to the Post-Conviction Hearing Act. (Ill. Rev. Stat. 1969, ch. 38, par. 122-1, et seq.) On appeal, petitioner's only argument is that the representation afforded him at the hearing on his post-conviction petition was inadequate.

On February 10, 1965, after a jury trial, petitioner was convicted of murder and was sentenced to a term of 50 to 100 years in the Illinois State Penitentiary. Petitioner appealed and on January 12, 1967, this court affirmed the conviction. (People v. Caldwell (1967), 79 Ill.App.2d 273, 224 N.E.2d 634.) Subsequently, the Supreme Court granted leave to appeal and on March 28, 1968, they affirmed the conviction. (People v. Caldwell (1968), 39 Ill.2d 346, 236 N.E.2d 706.) On January 26, 1970 the petitioner filed a pro se post-conviction petition. The public defender was appointed to represent petitioner.

On November 18, 1970, a hearing was held on petitioner's pro se post-conviction petition. The assistant public defender stated to the court that he had possession of petitioner's pro se post-conviction petition, had read the transcript of the trial, had an interview sheet filled out by petitioner and had personally interviewed the petitioner. He then stated that in his opinion, to amend the petitioner's pro se post-conviction petition would be frivolous and asked leave to withdraw under Anders v. California (1967), 386 U.S. 738. The assistant state's

* Mr. Justice English did not participate

attorney made a motion to dismiss this petition on the grounds of res judicata. The trial court denied both motions, stating that he would require the reasons to be set forth in writing why the petition should not be prosecuted.

On November 30, 1970, a second hearing was held on petitioner's pro se post-conviction petition. The assistant public defender representing petitioner again stated that he had read the trial transcript and had communicated with the petitioner. He then elected to stand on the pro se post-conviction petition. The court then denied defendant's petition without an evidentiary hearing. Defendant thereafter appealed to the Supreme Court which subsequently transferred the cause to this court.

Petitioner's only argument on appeal is that his court appointed attorney did not adequately represent him at the post-conviction hearing. Petitioner bases this argument on the grounds that the attorney failed to amend the pro se petition to set forth petitioner's contentions that his conviction was obtained through the knowing use of perjured testimony and that the representation by his privately retained trial counsel was inadequate.

Petitioner's argument that his conviction was obtained through the knowing use of perjured testimony is premised upon the fact that the arresting officer, knowing that petitioner could not read, obtained his signature on a document which misrepresented the statements given by him at a time when he was unrepresented by counsel. In his direct appeal to this court petitioner argued that his constitutional rights were violated by the introduction into evidence of his confession because he was not told of his right to counsel, he did not read the statement, the statement was not read back to him, he was illiterate and could not read, and he did not sign the statement, but this court rejected those contentions. (People v. Caldwell (1967), 79 Ill.App. 2d 273, 281-282, 224 N.E.2d 634, 638-639.) In petitioner's appeal to the Supreme Court, he made a similar argument urging that his case was

remanded for the limited purpose of conducting a hearing to determine the admissibility of his confession and that court rejected his contention. (People v. Caldwell (1967), 39 Ill.2d 346, 351, 236 N.E.2d 706, 710.) While phrased differently, the proposition now advanced by petitioner is basically the same as that presented in his direct appeals. Having had two reviews on the question of his confession, he is now barred from any reconsideration of that allegation in a post-conviction proceeding by the doctrine of res judicata. People v. Bright (1969), 42 Ill.2d 331, 247 N.E.2d 426; People v. Walker (1972), 6 Ill. App. 3d 909, 286 N.E.2d 812; People v. Westbrook (1972), 5 Ill.App.3d 970, 284 N.E.2d 695.

Similarly, petitioner's argument as to the inadequacy of his original privately retained trial counsel was known from the original trial record and could have been presented in the defendant's two direct appeals. The concept of res judicata includes all issues actually presented and those which could have been presented, but were not. (People v. Bracey (1972), 8 Ill.App.3d 119, 289 N.E.2d 241.) It is a settled rule that when a conviction has been reviewed any claim which could have been raised, but was not, is considered waived. (People v. Ashley (1966), 34 Ill.2d 402, 216 N.E.2d 126; People v. Jones (1972), 5 Ill.App.3d 951, 284 N.E.2d 418.) This rule will be relaxed only where fundamental fairness requires it. (People v. Mamolella (1969), 42 Ill.2d 69, 245 N.E.2d 485.) In the case at bar the petitioner had two separate reviews of his original conviction. Not having presented the issue of incompetency of his original trial counsel in either of those appeals, petitioner is now barred from raising that issue in a post-conviction proceeding.

In People v. Smith (1968), 40 Ill.2d 562, 241 N.E.2d 415, the petitioner appealed the dismissal of his pro se post-conviction petition. That his representation at the post-conviction hearing was inadequate in that his attorney did not seek leave to amend the petition. In rejecting this contention and affirming the dismissal of the post-

conviction petition, the court said:

While appellate counsel asserts defendant's representation in the post-conviction hearing was inadequate and that leave to amend the petition should have been sought, no motion for leave to amend was there made nor does there appear any reason to believe the petition could have been successfully amended.

In People v. Goodwin (1972), 5 Ill.App.3d 1091, 284 N.E.2d 430, petitioner appealed the dismissal of his post-conviction petition. On appeal, petitioner argued that he was denied effective assistance of counsel in the post-conviction proceedings. In rejecting this contention, this court said:

The doctrine of Slaughter has no application in this case. It is conceded by petitioner that his court appointed counsel consulted with him. Petitioner, however, does not show how his petition could have been amended to state a case for post-conviction relief. Not every post-conviction petition can be amended so as to avoid the legal defects in a petitioner's claim. For this reason, failure of a petitioner's counsel to amend the post-conviction petition does not, in itself, establish inadequate or incompetent representation. There must be a showing that the petition could be amended to state a case on which post-conviction relief can be granted.

See also People v. Burns (1972), 4 Ill.App.3d 893, 282 N.E.2d 185.

In the case at bar, petitioner's representation in the post-conviction hearing complied with the requirements set forth in People v. Slaughter (1968), 39 Ill.2d 278, 235 N.E.2d 566, and Illinois Supreme Court Rule 651(c). (Ill. Rev. Stat. 1971, ch. 110A, par. 651(c).) Petitioner's counsel had personally interviewed him, had possession of his pro se post-conviction petition, had completely reviewed the trial transcript and had an interview sheet filled out by petitioner. The failure of petitioner's counsel to amend the post-conviction petition does not establish inadequate representation since there is no showing that the petition could have been amended to state a cause upon which post-conviction relief could have been granted.

The petitioner relies upon People v. Hawkins (1971), 40 Ill.2d 296, 255 N.E.2d 456 and People v. Turner (1968), 40 Ill.2d 377, 255 N.E.2d 377. In both cases the Supreme Court reversed because of the inadequate representation by counsel at the post-conviction hearing.

Court in both cases relied upon the fact that petitioner's counsel in the post-conviction proceedings had not consulted with the petitioner and had not reviewed the trial transcript. In the case at bar the record affirmatively shows that counsel representing petitioner in the post-conviction proceedings did personally consult with him, did fill out a questionnaire filled out by him and had completely reviewed the trial transcript.

For these reasons the order of the circuit court of Cook County dismissing the post-conviction petition is affirmed.

Affirmed.

[PUBLISH ABSTRACT ONLY]

57964



PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
WILLIAM J. SNIPE, JR.,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	PRESIDING.

ABST

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

William J. Snipe, Jr., was charged with theft. Ill.Rev. Stat. 1971, ch. 38, par. 16-1(a)(1). After a bench trial, he was found guilty and sentenced to six months in the House of Correction. He appeals on the sole ground that the complaint is fatally defective, in that it does not contain an averment of ownership of the property alleged to have been stolen.

Section 16-1(a)(1) of the Criminal Code provides:

A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; ***

*** and

(1) Intends to deprive the owner permanently of the use or benefit of the property ***.
(Emphasis added.)

The complaint in the case at bar (which was executed by one Jack Olesker) charges that the defendant committed the offense of theft, in that he

*** knowingly exerted unauthorized control over property: 1 pair mens dress flair pants of the value of \$150.00 or less, namely \$49.95, with the intent to deprive said Jack Olesker permanently of the use and benefit of said property ***.

* Justice Drucker took no part in this case.

In People v Baskin, 119 Ill.App.2d 18, 255 N.E.2d 42, the defendant there was similarly charged with the offense of theft in that he

[K]nowingly exerted unauthorized control over cosmetics of the value of \$5.00, intending to permanently deprive the said Walgreen Drug Co. of the use and benefit of the said property ***.

The Third Division of this court there held that the complaint did not allege ownership of the property, that it was therefore defective, and reversed the conviction.

While the facts in Baskin are somewhat at variance with those in the case before us, the distinction argued by the state is not sufficient to produce a different result, and we agree with the defense that the Baskin decision expresses the law applicable here.

The judgment is reversed.

R E V E R S E D.

(Publish abstract only.)



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